No. 91-1207 ②

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRONT ROYAL AND WARREN COUNTY
INDUSTRIAL PARK CORPORATION,

FRED W. MCLAUGHLIN AND
GLADYS L. MCLAUGHLIN,

Petitioners,

v.

TOWN OF FRONT ROYAL, VIRGINIA, et al.

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90- 1875

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION, a Virginia Corporation; FRED W. MCLAUGHLIN; GLADYS L. MCLAUGHLIN,

Plaintiffs-Appellees,

v.

TOWN OF FRONT ROYAL, VIRGINIA, a municipal corporation; JOHN MARLOW, individually and as Mayor of the Town of Front Royal; MICHAEL KITTS, individually and as a member of the Town Council of the Town of Front Royal, Virginia; EDWIN L. POMEROY, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; ALBERT G. RUFF, JR., individually and as a former member of the Town Council of the Town of Front Royal, Virginia; GEORGE E. BANKS, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; BRACKENRIDGE H. BENTLEY, individually and as Town Manager of the Town of Front Royal, Virginia,

Defendants-Appellants,

VIRGINIA ASSOCIATION OF COUNTIES; LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INCORPORATED,

Amicus Curiae.

No. 90-1884

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION, a Virginia Corporation; FRED W. MCLAUGHLIN; GLADYS L. MCLAUGHLIN,

Plaintiffs-Appellants,

v.

TOWN OF FRONT ROYAL, VIRGINIA, a municipal corporation; JOHN MARLOW, individually and as Mayor of the Town of Front Royal; MICHAEL KITTS, individually and as a member of the Town Council of the Town of Front Royal, Virginia; EDWIN L. POMEROY, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; ALBERT G. RUFF, JR., individually and as a former member of the Town Council of Front Royal, Virginia; GEORGE E. BANKS, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; BRACKENRIDGE H. BENTLEY, individually and as Town Manager of the Town of Front Royal, Virginia,

Defendants-Appellees,

VIRGINIA ASSOCIATION OF COUNTIES; LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INCORPORATED,

Amicus Curiae.

Appeals from the United Stated District Court
for the Western District of Virginia, at Harrisonburg.
James H. Michael, Jr., District Judge.
(CA-87-19, CA-87-20)

Argued: June 3, 1991
Decided: September 19, 1991
Before ERVIN, Chief Judge, and SPROUSE and WILKINS, Circuit Judges.

Vacated and remanded by published opinions. Chief Judge Ervin wrote the opinion, in which Judge Sprouse and Judge Wilkins joined.

COUNSEL

ARGUED: Glenn M. Hodge, WHARTON, ALDHIZER & WEAVER, Harrisonburg, Virginia, for Appellants. Harold Jonathan Krent, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Amici Curiae. Robert C. Fitzgerald, FITZGERALD & SMITH, P.C., Fairfax, Virginia, for Appellees. **ON BRIEF:** Douglas L. Guynn, Mark D. Obenshain, WHARTON, ALDHIZER & WEAVER, Harrisonburg, Virginia; David N. Crump, ADAMSON, CRUMP & SHARP, Front Royal, Virginia, for Appellants. Harold P. Juren, G. Timothy Oksman, Joseph P. Rapisarda, Jr., LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., Charlottesville, Virginia; C. Flippo Hicks, VIRGINIA ASSOCIATION OF COUNTIES, Richmond, Virginia, for Amici Curiae. Myron C. Smith, FITZGERALD & SMITH, P.C., Fairfax, Virginia, for Appellees.

OPINION

ERVIN, Chief Judge:

Plaintiffs in this consolidated § 1983 action are Warren County Industrial Park Corporation ("Front Royal Corporation") and two Front Royal, Virginia, landowners. They sought damages from the Town of Front Royal ("Front Royal") and several Front Royal officials, alleging that they violated plaintiffs' fifth and fourteenth amendment rights. Although plaintiffs had remedies available to them under state law, they did not pursue those remedies but instead came into federal court seeking relief. The district court granted summary judgment in favor of plaintiffs. We find that the district court should have abstained from ruling in this case and therefore vacate the order granting summary judgment.

I

Plaintiffs own parcels of land which were annexed by Front Royal in 1976 and 1978 pursuant to separate Annexation Court orders. The orders directed Front Royal to extend sewer service to the parcels of land covered by the annexation orders as expeditiously as practicable, but in any event within 5 years of the entry of the orders. Front Royal failed to extend sewer service to plaintiffs' parcels. As a result, plaintiffs sought to vindicate their rights under the fifth and fourteenth amendments and 42 U.S.C. § 1983 in the United States District Court for the Western District of Virginia.

Plaintiffs alleged that the refusal by the defendants to extend sewer service to their parcels deprived them of all economically viable uses of their property. Plaintiffs also contended that they were denied equal protection of the law because defendants provided sewer service to similarly situated landowners within the annexed area, while denying the same service to plaintiffs.

Defendants raised several affirmative defenses including absolute legislative immunity and executive qualified immunity. The district court granted plaintiffs' motion to strike the absolute immunity defense, and defendants appealed to this court in an interlocutory appeal. In a previous holding, we upheld the district court's holding that absolute legislative immunity was not available to defendants. *Front Royal & Warren County Indus. Park*

Corp. v. Front Royal, 865 F.2d 77 (4th Cir. 1989) ("*Front Royal I*").

Thereafter, the district court granted plaintiffs' motion to strike defendants' asserted qualified immunity defense. *Front Royal & Warren County Indus. Park Corp. v. Front Royal*, 708 F. Supp. 1477, 1480-82 (W.D. Va. 1989) ("*Front Royal II*"). On cross motions for summary judgment, the district court granted plaintiffs' motion on the § 1983 takings claim. *Id.* at 1483-85. The court rejected defendants' argument that (1) there was no compensable taking; and (2) adequate state remedies existed which should have counselled the district court to abstain from hearing the case at all. The district court also granted summary judgment in favor of plaintiffs on the equal protection claim. *Id.* at 1487. The court held that the actions taken by the town counsel served no legitimate governmental purpose and that the actions deprived plaintiffs of equal protection of the laws. After granting summary judgment in favor of plaintiffs, the district court held a bench trial on the issue of damages and awarded the following amounts: $176,526.56 to the individual landowners and $489,072.59 to the Front Royal Corporation. *Front Royal & Warren County v. Front Royal*, 749 F. Supp. 1439, 1448-49 (W.D. Va. 1990) ("*Front Royal III*").

Both parties appealed from the judgment of the district court. Defendants alleged that there were numerous erroneous rulings by the district court, and plaintiffs asserted that the court should have awarded punitive damages.

II

The defendants and *amici curiae* urge us to abstain from ruling in this case. They assert that under Virginia law, alternative remedies were available to plaintiffs. In addition, they argue that land use policy is local in nature and that federal courts should not intrude into this area unless absolutely necessary.

We note at the outset that we are not barred from abstaining in this case because we previously issued an opinion in *Front Royal I*, 865 F.2d 77. There, we addressed the issue of absolute immunity on interlocutory appeal. We held that the district court's order dismissing the absolute immunity defense was immediately appealable. *Front Royal I*, 865 F.2d at 79. However, the fact that we had jurisdiction over the district court's order regarding absolute immunity did not permit us to review other claims raised below. *See Abney v. United States*, 431 U.S. 651, 662-63 (1977). We could have considered the abstention issue only if it fell within the exception to the final-judgment rule set out in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949). Therefore, it is proper for us to now consider whether abstention is appropriate even though we have already issued an opinion in this case.

Plaintiffs argue that we should not consider the abstention issue because it was not raised by defendants, but was raised by *amici curiae* on this appeal. We note, however, that we may apply the abstention doctrine at our own instance even if no party urges the doctrine upon us. *Caleb Stowe Associates, Ltd. v. County of Albemarle*, 724 F.2d 1079, 1080 (4th Cir. 1984); *AFA Distributing Co. v. Pearl Brewing Co.*, 470 F.2d 1210, 1213 (4th Cir. 1973). Therefore, we turn to the issue of whether we should abstain from ruling on the case before us.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court set out a form of abstention which is appropriate in order to prevent unnecessary interference by the federal courts in the interpretation of a complex state regulatory scheme. This court has explained the purpose of the *Burford* abstention doctrine as follows:

> The purpose of *Burford* abstention is to prevent a federal court from interfering with a "complex

> state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded." *Aluminum Co. v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *Cert. denied*, __U.S. __, 104 S. Ct. 1326 (1984).

Browning-Ferris, Inc. v. Baltimore County, 774 F.2d 77, 79 (4th Cir. 1985).

In *Browning-Ferris*, complex state regulations governing landfill operations were at issue. We held that abstention was proper based on the following reason:

> [T]he state regulations governing landfill operations are lengthy and detailed and involve complex scientific questions that must be reviewed before a permit for a waste disposal facility is approved. The *Burford* requirement that a complex state regulatory scheme be involved in order for a district court to abstain is sufficiently present in this case.
>
> Additionally, land use questions, . . . are the peculiar concern of local and state governments, and traditionally, federal courts have not interfered with state courts in the area of land use policy.

Id. at 79. Similarly, in *Caleb Stowe Associates*, 724 F.2d 1079 (4th Cir. 1984), we abstained from deciding the case because it involved a matter of state and local land use law. *Id.* at 1080. There,

> . . . all of the plaintiffs' state and federal claims necessarily depended[ed] upon the construction of state land use law concerning the scope of authority of local planning bodies and Boards of Supervisors, the proper interpretation of state

> and local land use law and county zoning practices and procedure.

Id.

In *Fralin & Waldron, Inc. v. Martinsville*, 493 F.2d 481 (4th Cir. 1974), we abstained from deciding a land use case because "the courts of Virginia ha[d] extensive familiarity and experience with such matters, and . . . should have the initial opportunity to pass upon them." *Id.* at 482.

We noted that a state adjudication might avoid: (1) the necessity of a decision on the federal constitutional questions presented; and (2) "needless friction in federal-state relations over the administration of purely state affairs." *Id.* at 483. We find the reasoning of the above cases persuasive. Here, we are asked to determine that Front Royal violated the orders of the Annexation Courts and that, as a result, plaintiffs' land was taken without just compensation, and plaintiffs were denied equal protection of the law. All of plaintiffs' claims stem from their assertion that Front Royal violated the Annexation Courts' orders.

In Virginia, Annexation Courts are established by statute to determine whether a city or town may annex adjacent land. Va. Code Ann. § 15.1-1035 *et seq.* (1989 Repl. Vol.). The Annexation Court is composed of three judges designated by the Supreme Court of Virginia. Va. Code Ann. § 15.1-1038 (1989 Repl. Vol.). The Annexation Court is to determine the "necessity for an expediency of annexation" considering the best interests of the city or town and the people in the area to be annexed. Va. Code Ann. § 15.1- 1041(b) (Repl. Vol.). If the Annexation Court grants the petition for annexation, the Court "shall set forth in detail all such terms and conditions upon which the petition is granted." Va. Code Ann. § 15.1-1041(d).

The Annexation Court "shall enter an order setting forth what it deemed fair and reasonable terms and conditions, and shall direct the annexation in conformity therewith." Va. Code Ann. § 15.1- 1042 (1989 Repl. Vol.). The Annexation Court remains in existence for 10 years from the effective date of any annexation order entered. Va. Code Ann. § 15.1-1047(a) (1989 Repl. Vol.). The Annexation Court can be reconvened

> . . . at any time during the ten-year period on its own motion, or on motion of the governing body of the county, or of the city or town, or on petition of not less than fifty registered voters or property owners in the area annexed; provided, however, if the area annexed contains less than 100 registered voters or property owners, then a majority of such registered voters or property owners may petition for the reconvening of the court.

Va. Code Ann. § 15.1-1047(b) (1989 Repl. Vol). The Annexation Court has the power during the ten year period to enforce the performance of the terms and conditions under which annexation was granted. Va. Code Ann. § 15.1-1047(c) (1989 Repl. Vol.). Any action by the Annexation Court under § 15.1047(c) is subject to review by the Supreme Court of Appeals of Virginia. Va. Code Ann. § 15.1-1047(d) (1989 Repl. Vol.). In addition, "[m]andamus and prohibition shall lie from the Supreme Court of Appeals or any circuit court to compel a city or town to carry out the provisions of [the annexation statute] or to forbid any violation of the same." Va. Code Ann. § 15.1-1048 (1989 Repl. Vol.).

In this case, the orders of two separate Annexation Courts are at issue. The 1978 Annexation Court, whose order covered property owned by the Front Royal Corporation, reconvened itself in 1983 after being petitioned by the Front Royal Corporation for the purpose of determining whether its order had been obeyed. Based on representations made by the town at that hearing regarding their plans for adding sewer lines, the Annexation Court found that Front Royal was in substantial compliance with the 1978 order. The 1976 Annexation Court, whose order covered the individual landowners' property, was never reconvened.*

At the heart of the case before us is the question whether Front Royal ever complied with the orders of the Annexation Courts. The answer requires interpretation of the Annexation Courts' orders, which is a determination that the Annexation Court was uniquely qualified to make. The annexation system as set up in Virginia is a complex scheme. It involves a court system set up specifically to deal with the annexation process. It provides for appeal to the Virginia courts if the town fails to comply with the Annexation Court's orders. *See* Va. Code § 15.1-1048. We believe that this annexation scheme is sufficiently local in nature to warrant our abstaining from deciding the issues before us. Like the claims in *Fralin* and *Caleb Stowe*, all of plaintiffs' federal claims necessarily depend upon the construction of state law—here the orders of the Annexation Courts. The courts of Virginia have much greater familiarity with the operations of the Virginia annexation scheme, and we believe that they should have the first opportunity to pass upon them. *See Fralin*, 493 F.2d at 482.

In addition, there are other state remedies which might be available to plaintiffs. The Virginia Constitution provides due process protection to those who have been unlawfully deprived of their property. Va. Const. art. I, § 11. Virginia courts have consistently recognized a common law cause of action to protect this right. *See Groves v. Cox*, 559 F. Supp. 772, 777 (E.D. Va. 1983); *Morris v. Elizabeth River Tunnel District*, 203 Va. 196, 123 S.E.2d 398 (1962).

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* We note that 10 years have now run from the date of the Annexation Courts' original orders. Thus, there is a question whether the Courts could be reconvened at this time. However, because of the defendants' behavior in this case contributing to the passing of these deadlines, it might be that the Annexation Courts could reconvene under the special circumstances of this case. That is not for us to decide, however.

Because the annexation court system is a matter of purely state and local law, and because there may be other state remedies available to plaintiffs in this case, we vacate the district court's orders granting summary judgment and damages in favor of plaintiffs. However, as think that it is appropriate for the district court to retain jurisdiction over the case pending the outcome of the state proceedings because they may not fully dispose of all of the federal claims. *See Caleb Stowe*, 724 F.2d at 1080-81 (directing the district court to retain jurisdiction over the case pending a state court determination); *Forest Hills Utility Co. v. City of Heath, Ohio*, 539 F.2d 592, 596 (6th Cir. 1976) (holding that the district court should have retained jurisdiction over the claims pending the outcome of state proceedings when it abstained under the *Pullman* and *Burford* doctrines). Therefore, we vacate the district court's orders and remand with instructions to retain jurisdiction of the case pending the outcome of the state court proceedings.

VACATED AND REMANDED
WITH INSTRUCTIONS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88- 2066

Front Royal and Warren County Industrial Park Corporation, a Virginia Corporation; Fred W. McLaughlin; Gladys L. McLaughlin,

Plaintiffs-Appellees,

versus

Town of Front Royal, Virginia; John Marlow, and as Mayor; Michael Kitts, individually and as member of Town Council; Edwin L. Pomeroy, individually and as member of Town Council; Albert G. Ruff, Jr., individually and as former member; George E. Banks, individually and as former member, Brackenridge H. Bentley, individually and as Town Manager,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. James H. Michael, Jr., District Judge. (CA-87-0019 and CA-87-0020).

Argued: October 5, 1988 Decided: January 9, 1989

Before WINTER, SPROUSE, and ERVIN, Circuit Judges.

Mark D. Obenshain (Glenn M. Hodge, WHARTON, ALDHIZER & WEAVER on brief) for Appellants. Robert C. Fitzgerald (Myron C. Smith, FITZGERALD & SMITH, P.C. on brief) for Appellees.

ERVIN, Circuit Judge

Plaintiffs in this consolidated § 1983 action are two Front Royal, Virginia, landowners and the Front Royal and Warren County Industrial Park Corporation. Plaintiffs seek damages from defendants, the Town of Front Royal ("Front Royal") and various Front Royal officials, for alleged violations of plaintiffs' fifth and fourteenth amendment rights. The district court granted plaintiffs' motion to strike defendants' absolute immunity defense. We hold that the district court's order striking the defense was immediately appealable, and affirm.

I.

Plaintiffs own parcels of land annexed by Front Royal in 1976 and 1978. At the times of annexation, the Virginia Annexation Court ordered Front Royal to extend sewer service to the annexed parcels as quickly as reasonably possible, and in any event within five years. Plaintiffs allege that Front Royal has denied their repeated requests for sewer service. When plaintiffs filed suit on February 12, 1987, Front Royal had not yet extended sewer service to the annexed parcels.

Plaintiffs' complaints alleged that defendants' failure to provide sewer service had deprived plaintiffs of all economically viable and reasonable uses of their land. Plaintiffs also alleged that defendants had deprived them of equal protection of the laws by withholding sewer service from plaintiffs while providing service to other landowners whose needs were no greater than plaintiffs'.

Defendants interposed a number of affirmative defenses, among them that absolute legislative immunity insulated them from suit. Plaintiffs moved to strike the absolute immunity defense, contending that defendants had taken no legislative action with respect to sewer service. The district court granted plaintiffs' motion to strike in an order from which defendants noticed an interlocutory appeal.[1] Plaintiffs in turn argue that the order is not immediately appealable.

II.

Plaintiffs advance the threshold contention that the district court's order is not immediately appealable under the test articulated in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).[2] We disagree. The Supreme Court has several times held that orders denying claims of absolute immunity are immediately appealable. *Nixon*, 457 U.S. at 742.

We also note initially that we have held that orders denying absolute immunity are, as a general matter, immediately appealable under the *Nixon* criteria. *England v. Rockefeller*, 739 F.2d 140, 142 (4th Cir. 1984); *Bever v. Gilbertson*, 724 F.2d 1083, 1086-87 (4th Cir.), *cert. denied*, 469 U.S. 948 (1984). Plaintiffs nonetheless contend that this appeal presents no serious and unsettled question of law. Because what defendants have asserted is essentially the right to avoid trial, we believe the district court's denial of immunity presents a serious legal issue. We know of no Supreme Court case that has resolved an absolute immunity claim similar to that broached by defendants. *See Nixon*, 457 U.S. at 743. We therefore conclude that the district court's order in this case was immediately appealable.

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[1] The order also denied defendants' motion to dismiss the action based on absolute immunity.

[2] *Nixon* declared that:

> [A] small class of interlocutory orders are immediately appealable to courts of appeals. . . . [T]his class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) . . . [A]n additional requirement [is] that collateral appeal of an interlocutory order must "presen[t] a serious and unsettled question." (quoting *Cohen v Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949)).

457 U.S. at 742 (citations omitted).

III.

It is well established that local legislators enjoy absolute immunity from suit for decisions made in their capacity as legislators. *Scott v. Greenville County*, 716 F.2d 1409, 1422-23 (4th Cir. 1983); *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980). The inquiry in this case is accordingly whether the district court correctly concluded that the defendants' denials of requests for sewer service were not legislative actions. We believe the district court was correct to conclude that the defendants' decisions were not legislative.[3]

In *Scott*, 716 F.2d at 1423, we held that when municipal officials "do more than adopt prospective, legislative-type rules and take the next step into the area of enforcement, they can claim only the executive qualified immunity appropriate to that activity." We agree with the district court that defendants' decisions had to do with zoning enforcement rather than with rulemaking. See *First Virginia Bank-Colonial v. Baker*, 301 S.E.2d 8, 11 (Va. 1983) (municipal officer liable for misfeasance of a ministerial duty); *Howlett v. City of South Norfolk*, 69 S.E.2d 346, 348 (Va. 1952) (construction of authorized public works as a ministerial activity); *Hoggard v. Richmond*, 200 S.E. 610, 615 (1939). The order of the Virginia Annexation Court removed what discretion defendants might otherwise have had to approve or decline plaintiffs' requests for sewer service. Defendants have not argued that they could lawfully have defied the annexation court's order,[4] or that their failure to comply with the order represented a policy decision that to do so was in the best interests of Front Royal's citizens. Defendants have, in short, not claimed that their failure to authorize sewer service is the sort of discretionary, prospective determination that warrants absolute immunity.

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[3] Plaintiffs did not appeal the district court's denial of their motion to strike defendants' qualified executive immunity defense. Our decision accordingly reflects no opinion on the applicability or effect of the qualified immunity defense.

AFFIRMED.

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[4] Counsel stated in oral argument that the Virginia Annexation Court no longer exists, but did not contest the continuing validity of the court's orders with respect to plaintiffs' parcels.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-2066

Front Royal and Warren County Industrial Park Corp., et al,
Plaintiffs-Appellees,

v.

Town of Front Royal, et al.
Defendants-Appellants.

FILED
JAN 31 1989
U.S. Court of Appeals
Fourth Circuit

On Petition for Rehearing

Upon consideration of appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin, with the concurrence of Chief Judge Winter and Judge Sprouse.

For the Court

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CIVIL ACTION NO. 87-0019-H

FRONT ROYAL AND WARREN COUNTY
INDUSTRIAL PARK CORP.,
Plaintiff

v.

TOWN OF FRONT ROYAL, VIRGINIA, et al.,
Defendants

CIVIL ACTION NO. 87-0020-H

Judge James H. Michael, Jr.

FRED W. McLAUGHLIN, et ux.,
Plaintiffs

v.

TOWN OF FRONT ROYAL, VIRGINIA, et al.,
Defendants

Clerk's Office U.S. Dist. Court
at Harrisonburg, VA

Filed

Oct 22 1990

Joyce F. Witt, Clerk

By: /s/ P. Hensley
Deputy Clerk

ORDER

For the reasons stated in the accompanying Memorandum Opinion, the court hereby finds as follows:

(1) The Front Royal and Warren County Industrial Park Corporation, plaintiffs in Civil Action No. 87-0019-H, are entitled to recover compensatory damages in the amount of $489,072.59, costs and attorney's fees incurred through December 4, 1989 in the amount of $68,096.25, plus additional costs and fees as may be shown to the court; and

(2) Fred W. McLaughlin, et ux., plaintiffs in Civil Action No. 87-0020-H, are entitled to recover compensatory damages in the amount of $176,526.56, costs and attorney's fees incurred through December 4, 1989 in the amount of $39,371.30, plus additional costs and fees as may be shown to the court.

In light of these findings, it is hereby

ADJUDGED AND ORDERED

as follows:

(1) The indicated damages amounts shall be paid by the defendants.

(2) The plaintiffs herein shall make an appropriate showing of such additional attorney's fees and costs to the court by November 12, 1990.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge

October 22, 1990
Date

A TRUE COPY, TESTE:
JOYCE F. WITT, CLERK
BY: /s/ P. Hensley
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA HARRISONBURG DIVISION

Civil Action No. 87-0019-H

Clerk's Office U.S. Dist. Court
at Harrisonburg, VA

Filed

Oct 22 1990

Joyce F. Witt, Clerk

By: P. Hensley
Deputy Clerk

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORP.,
Plaintiff

v.

TOWN OF FRONT ROYAL, VIRGINIA, et al.,
Defendants

Civil Action No. 87-0020-H

Judge James H. Michael, Jr.

FRED W. McLAUGHLIN, et ux.,
Plaintiffs,

v.

TOWN OF FRONT ROYAL, VIRGINIA, et al.,
Defendants

MEMORANDUM OPINION

Plaintiffs in these consolidated actions own land in the town of Front Royal, Virginia. As a result of the town's failure to supply the plaintiffs' properties with sewer and water service in a timely fashion, as required by a decree of a state annexation court, this court previously held as a matter of law that a Fifth Amendment taking of the plaintiffs' properties had been effected. *Front Royal & Warren County Industrial Park Corp. v. Front Royal*, 708 F. Supp. 1477, 1484 (W.D. Va. 1989) ("*Front Royal I*"). The court also granted plaintiffs' motions for summary judgment on their Fourteenth Amendment Equal Protection claims. *Id.* at 1487. Subsequently these actions came before the court, sitting without a jury, for a trial on damages. The court heard testimony from January 30 to February 1 and also on February 21, 1990. Plaintiffs seek both actual and punitive damages. This court has jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(3), (4). Both parties have submitted post-trial memoranda and proposed findings of fact and conclusions of law; this matter is now ripe for disposition.

The court fully set forth the facts which supported the finding that a Fifth Amendment taking had occurred in *Front Royal I* and will not recite them again here. The court will, however, briefly summarize the facts from its previous explication in order to place the present issue — the amount of damages which the plaintiffs claim — in context.

Plaintiffs are several individuals and a corporation who own land in an area annexed from Warren County by the Town of Front Royal (the "Town") under separate Annexation Court orders of 1976 and 1978. The orders of annexation required the Town to extend sewer service to the annexed areas as expeditiously as possible, but not later than five years after the entry of the orders. At the time the plaintiffs filed the present suits, the Town had not yet provided sewer service to any of the subject parcels. Because the failure to provide the sewer rendered the land unusable,[1] this court found that a Fifth Amendment taking had occurred. Additionally, although the Town had not made sewer available to the plaintiffs' properties, it had made the service available to other similarly situated parcels in the area. Most notably, the Town provided sewer to property belonging to the then Mayor of the Town, who was subsequently able to develop the property into a subdivision. Based on these facts, the court further found that the defendants' actions violated plaintiffs' Equal Protection rights.

I

Pursuant to Federal Rule of Civil Procedure 52(a), the court finds the following facts.

Plaintiffs Fred W. McLaughlin and his wife, Gladys L. McLaughlin, own as tenants in common a tract of land of approximately 55 acres known as Happy Creek Knolls. The McLaughlins purchased this tract of land for $14,350.00 as an investment property in July of 1964 when it was a part of Warren County. On December 31, 1976, the Town annexed a large parcel of land including the Happy Creek Knolls tract. Immediately before the annexation, the plaintiffs subdivided their property and it was taken into the Town as a subdivision. The property is zoned R-1, which allows the construction of single family homes on lots of at least 10,000 square feet.

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[1] Indeed, as is detailed more fully below, at the time of the trial on damages the industriai park property had still not been provided the required sewer and the individuals plaintiffs' property had had sewer services for only a matter of months.

The Front Royal and Warren County Industrial Park Corporation (the "Corporation") is a private stock company of which Fred W. McLaughlin is President. In 1973 and 1974 the Corporation purchased parcels of land totalling 86 acres in Warren County. The purchase price was approximately $107,000.00. The Town annexed this land, along with other property, in 1978. The Corporation's property was zoned industrial and had been subdivided into 16 lots before the annexation.

By Order of the annexation court in 1976, the Town was given a maximum of five years within which to provide sewer service to the Happy Creek Knolls property. In accordance with the annexation court's order, sewer was to have been available to the property no later than December 31, 1981. Sewer service was not actually available to the property until October 11, 1989.

Because sewer service is now available to the Happy Creek Knolls property, the court finds that the taking of that property has ceased. The plaintiffs are entitled, however, to appropriate damages for the period of the taking.

By Order of the annexation court in 1978, the Town had a maximum of five years within which to provide sewer service to the Industrial Park property. In 1983 the annexation court granted the Town a two year extension of the sewer provision date. In accordance with the annexation court's order, the property was to be provided with sewer no later than December 31, 1985. As of the date of trial, sewer service was not yet fully available to the Industrial Park property.[2]

The court finds that the failure of the Town to provide sewer service in a timely fashion was the sole reason why the plaintiffs were unable to develop their property: the defendants' failure to provide appropriate sewer service prevented the plaintiffs from putting their property to its fullest and best use. Even though at various times during the relevant period the property was not appropriately configured to comply with local zoning ordinances, the court finds that this was due entirely to the absence of sewer service. For the plaintiffs to have undertaken the efforts necessary to comply with the ordinances when it was readily apparent that sewer service would still be unavailable, thus leaving the property still unsalable, would have been futile.

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[2] Because the Industrial Park property was taken into the Town already subdivided, the Town was required to provide service to each of the lots, not merely to one point on the edge of the entire tract. Service is currently available to some of the Industrial Park lots but not the majority.

II

As noted previously, the sole issue before the court is the amount of damages to which the plaintiffs are entitled. The court's previous Orders have established that a constitutional taking has occurred and that the defendants are not immune from liability for damages. Some of the evidence offered at the hearing on damages represented efforts of the parties, principally the defendants, to offer new evidence which would bolster their arguments in opposition to the court's previous rulings on liability. The court cautioned counsel on several occasions that it would consider only the evidence adduced at the hearing solely in regard to the issue of damages as the liability issues had previously been resolved. Whether such non-damages evidence was offered for the purpose of making a record is immaterial; it was not considered on the damages issue and obviously was not considered on the liability issue.

A. Compensatory Damages

A takings action can fall under two constitutional provisions, the fifth amendment of the United States Constitution or 42 U.S.C. § 1983.[3] In *Front Royal I*, this court found that the defendants had effectuated a compensable taking by violating the plaintiffs' due process rights under § 1983. That the plaintiffs' action arose under § 1983 and not the fifth amendment does not affect the appropriate measure of damages to which they are entitled. *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 n.3 (11th Cir. 1987) [*Wheeler III*].[4]

The question of which measure of damages the court should employ in this case is hardly clear. The court has looked to the vast array of takings jurisprudence and cannot find definitive precedent on the issue before it. As noted previously, this case does not involve condemnation proceedings, nor does it concern a taking which resulted from an unconstitutional regulation. The defendants effectuated the taking by failing to act on the annexation court's order. However, when examined in light of the Eleventh Circuit's definition of a regulatory taking in *Wheeler III*—

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[3] The fifth amendment, applicable to the states through the Fourteenth Amendment, provides "nor shall private property be taken for public use, without just compensation." Though the government may take property pursuant to formal condemnation proceedings, condemnation for "public use" is not a constitutional requisite. Government regulation can so restrict the use of land that it constitutes a taking. *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 (1987). Even where no regulation is involved, government actions which interfere with a landowner's beneficial use of property can constitute a taking. *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1206 (4th Cir. 1986). Takings which do not result from condemnation proceedings are technically not entitled to fifth amendment just compensation; however, such takings may be the basis of a 42 U.S.C. § 1983 claim if they violate fourteenth amendment due process rights. *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 n.3 (11th Cir. 1987). A governmental taking need not be permanent; the government must compensate the landowner even if a taking is temporary. *First Lutheran Church*, 482 U.S. at 318-319.

[4] *Wheeler* was appealed from the district court on four separate occasions. The court will cite to both the third and fourth appellate court decisions herein.

"a taking that is ultimately invalidated by a court"—*id.*, the facts of this case can most appropriately be analogized to a regulatory takings case.[5] Even so, the lack of definitive precedent on compensating a temporary regulatory taking compels the court to examine the relevant case law.

Just compensation for the government's permanent acquisition of private property is the property's fair market value at the time of the taking. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984). In a temporary taking, however, "the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period." *First Lutheran Church*, 482 U.S. at 319; *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990) (just compensation "is the value of the use of the property during the temporary taking, *i.e.*, the amount which the owner lost as a result of the taking."); *Nemmers v. City of Dubuque*, 764 F.2d 502, 504-05 (8th Cir. 1985) ("for a temporary taking, the government is responsible for compensating the owner for the interim during which it effected the taking.").

The issues before the Supreme Court in *First Lutheran* unfortunately did not include how to measure appropriately "the value of the [temporary] use of the land" in temporary regulatory takings cases. The Court offered some guidance, however, when it held that a temporary regulatory taking is no different from the government's temporary use of private property and should be similarly compensated.[6] *First Lutheran*, 482 U.S. at 318-19. Indeed, the Court contemplated this measure of damages for temporary regulatory takings — that just compensation for such a taking should be determined as is just compensation for the temporary use of private property — on two occasions prior to *First Lutheran.* In *United States v. Dow*, 357 U.S. 17 (1958), the Court stated that if the government were to abandon a condemnation proceeding, the taking would be temporary and "[i]n such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily." *Id.* at 26. Justice Brennan similarly expressed this in his dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981). In his discussion of the proper measure of relief in a temporary regulatory taking, Justice Brennan stated, "Rules of valuation for temporary 'takings' may be particularly useful . . . although additional rules may need to be developed." *Id.* at 659 (Brennan, J. dissenting) (citations omitted).

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[5] Although the taking at issue in this case is technically not a "regulatory taking," the cases concerning regulatory takings are analogous for the purpose of determining the appropriate compensation. As in a regulatory taking, the defendants in this case have prevented the plaintiffs from developing their property as they chose without initiating formal condemnation proceedings. The City Council in *Wheeler* passed an ordinance forbidding the plaintiff to build, whereas the Town of Front Royal made the conscious decision not to act according to the mandate of the annexation court's order. The governing bodies in both cases took affirmative steps to deny unconstitutionally the plaintiffs use of their property, and therefore the facts are comparable.

Although the Supreme Court has yet to rule definitively on the proper measure of just compensation in a temporary regulatory taking, some of the United States Courts of Appeals which have addressed the issue have adopted Justice Brennan's approach in *San Diego Gas. See Nemmers*, 764 F.2d at 505 n.2. In so doing, the courts have formulated a computation for damages which parallels that used for temporary use of private property takings.[7] *See Wheeler III*, 833 F.2d at 271; *Nemmers*, 764 F.2d at 505.

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[6] In *First Lutheran*, the Court found that temporary regulatory takings were compensable by comparing them to takings in which the government temporarily exercises its right to use private property, in which cases the owners are entitled to compensation for the temporary use. *First Lutheran*, 482 U.S. at 318-19.

[7] The method for determining appropriate damages for cases in which

The Eleventh Circuit recently addressed the issue of measuring damages from a temporary regulatory taking in a case similar to this one, *Wheeler v. City of Pleasant Grove*. 896 F.2d 1347 (11th Cir. 1990) [*Wheeler IV*]. The plaintiff in *Wheeler* had obtained a building permit to construct an apartment complex on his property. After community opposition to the project, the City Council passed an ordinance which forbade the construction of the complex. Wheeler brought his action under 42 U.S.C. §§ 1983 and 1985. A federal district court found that the ordinance, as applied to the plaintiffs, was unconstitutional,[8] *Wheeler III*, 833 F.2d at 268-69, even though it did not deny the plaintiff all use of his property. *Wheeler IV* at 1351.

In *Wheeler III*, the Eleventh Circuit set forth the following guidelines by which the district court was to determine the amount of damages suffered by the plaintiffs:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. The landowner's compensative interest, therefore, is the return of the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly,

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the government has exercised its right to temporarily use private property is well established. In such cases, the government essentially takes over an ongoing concern of the plaintiff, and just compensation is the fair rental value of the property over the period of the taking. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949) ("[T]he proper measure of compensation . . . is the rental that probably could have been obtained.") For example in *Yuba*, where the government had temporarily taken the mineral rights in the plaintiff's property, the Federal Circuit noted that "the usual measure of just compensation for a temporary taking . . . is the fair rental value of the property for the period of the taking." *Yuba*, 904 F.2d at 1581.

[8] The court further held that the City Council had arbitrarily and capriciously enacted and implemented an ordinance which was confiscatory in nature and had no rational purpose. *Wheeler III*, 833 F.2d at 268-69.

> the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction.

Wheeler III, 833 F.2d at 271 (citations omitted) (footnote omitted).

On remand, the district court chose not to follow the appellate court's instructions, finding instead that the plaintiffs could recover nothing because "the value of the property had increased despite the ordinance and since the ordinance had not destroyed the highest and best use of the land, 'the fair market value of the . . . property was not diminished by the enactment of [the ordinance].'" *Wheeler IV*, 896 F.2d at 1350 (citing the memorandum opinion of the district court). Once again on appeal, however, the Eleventh Circuit reversed. While noting that the land's fair market value probably did not decline as a result of the government action, *id.* at 1351, the appellate court rejected the district court's determination that the property's increase in value over the period of the taking necessarily negated the plaintiff's right to recover damages.[9] Repeating its previous instructions for adequately compensating the plaintiff, the Eleventh Circuit held that the district court should have determined the "difference in the fair market value of appellants' right to develop their property when they received their building permit and the fair market value of what remained after the City's actions against appellants." *Id.* Applying this method, the appellate court took the amount of the plaintiff's interest in the undisputed fair market value, at the time of the taking, of the complex which appellants had a right to build, and subtracted from that the plaintiff's interest in the value of the land only to get the "difference in fair market value lost as a result of the regulatory restrictions." *Id.* The court then computed the market rate of return on that amount to arrive at the correct amount of damages. *Id.* at 1352.

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[9] The Supreme Court has also rejected the proposition that "the difference between the market value of the fee on the date of the taking and its market value on the date of its return" was the appropriate measure of just compensation for a temporary taking because "there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949).

To determine the appropriate computation of damages in the *Wheeler* cases, the Eleventh Circuit relied upon the Eighth Circuit's analysis in another temporary regulatory takings case, *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985). In *Nemmers*, the plaintiff had invested in developing his land as an industrial park. The land was subsequently annexed and zoned residential, and the district court found that a temporary taking had occurred. The Eighth Circuit held that the proper method for calculating the damages which resulted from the taking was to determine "the difference between the property's fair market value when zoned [for industrial use] and its fair market value when zoned [for residential use]." *Id.* at 505. That amount, plus the return over the number of years at the appropriate interest rate, was the plaintiffs just compensation. *Id.*

This court finds the opinions of the Eighth and Eleventh Circuits persuasive on the appropriate measure of damages for a temporary regulatory taking. Both *Nemmers* and *Wheeler* indicate that, in computing damages, the court should determine the market value as of the date of the taking. *Wheeler*, 896 F.2d at 1351; *Nemmers*, 764 F.2d at 504. This is consistent with permanent takings jurisprudence, which bases just compensation on the fair market value at the date of the taking. Furthermore, the approach mirrors that used in takings involving the temporary use of private property — in which cases the owners are compensated for the period of use only — as the Supreme Court in *Dow* and Justice Brennan in *San Diego Gas* indicated would be proper. By determining the difference in value between what the plaintiff would have had absent the taking and what remained after the taking became effective, and adding the appropriate interest, the court can grant a remedy which is fair and adequate. The evaluation accounts for the fact that the owner still retains the property after the taking is invalidated and thus the plaintiff is justly compensated.

Before the court can apply the damages formula to the case at hand, it must briefly address alternative damages calculations proposed by the parties. During the hearing on damages, and in the parties' briefs on damages, the parties offered evidence as to the appropriateness of factors besides fair market value which the court could consider in determining the appropriate amount of compensatory damages. In particular, the plaintiffs seek economic redress for development expenses which accrued during the period of the taking. In essence, the plaintiffs suggest that they are entitled to compensation for consequential damages.

Fifth Amendment takings jurisprudence conclusively establishes that when the government effectuates a taking, "[t]he owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States v. Reynolds*, 397 U.S. 14, 15-16 (1970). Consequently, the Court has indicated in both permanent and temporary takings cases that just compensation does not include the consequential damages which an owner might suffer as a result of the taking. *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945) ("[T]hat which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage." (footnote omitted)). Indeed, courts have uniformly held that lost profits,[10] lost opportunities, and other consequential damages suffered because of a taking are not compensable. *See United States v. 565.54 Acres of Land*, 441 U.S. 506, 511 (1979) ("[F]air market value does not include the special value of the property to the owner arising from its adaptability to his particular use."); *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 282 (1943) ("[T]he sovereign must pay only for what it takes, not for the opportunities which the owner may lose."); Yuba, 904 F.2d at 1581-1582 (in a temporary taking of mineral rights, the difference in the value of the property's gold during the taking period and after the taking is "precisely the kind of claim for consequential damages — here, lost profits — that is not an appropriate element of just compensation for the temporary taking of property."); *Helenic Center, Inc. v. Washington Metro Area Transportation Authority*, 815 F.2d 982, 984 (4th Cir. 1987) ("ordinarily, indirect costs to the owner resulting from the taking . . . are not part of the just compensation which the owner is entitled to recover."); *United States v. 1735 N. Lynn St., Situated in Rosslyn, VA*, 676 F.Supp. 693, 701 (E.D.Va. 1987) (Damages for frustration of renovation plans are impermissible because "[t]he Fifth Amendment allows only fair market value, it does not guarantee a return on investment."). These cases clearly indicate that consequential damages are not appropriate in takings cases.

Despite the overwhelming authority against awarding consequential damages, the plaintiffs have noted that many courts have espoused the principle that courts are not bound by a specific formula in determining just compensation. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961); *United States v. Cors*, 337 U.S. 325, 332 (1949); *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). Rather, courts should examine the equities of a specific case to ascertain, in fairness, the appropriate amount of damages. *United States v. Fuller*, 409 U.S. 488, 490 (1973); *A.G. Davis Ice Co. v. United States*, 362 F.2d 934 (1st Cir. 1966); *United States v. Lee*, 360 F.2d 449, 452 (5th Cir. 1966); *Foster v. United States*, 2 Cl. Ct. 426, 446 (1983). The plaintiffs advance compelling arguments that equity and fairness concerns should compel this court to allow them damages beyond those ascertained by the formula governing temporary regulatory takings. They allege that economic relief should lie for certain acts, aside from the "taking" act of not providing sewer, which the defendants undertook during the course of the takings.[11]

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[10] When courts have awarded damages akin to lost profits, the government had taken an existing business or going concern. *See Kimball Laundry*, 338 U.S. at 15 (one element of just compensation was whatever "demonstrable loss of going-concern value" the taking caused.). In this case, the taking did not involve an ongoing concern.

During the period of the takings, the Town of Front Royal passed two measures which increased the plaintiffs' expense of developing their property. The first, effected in 1984, was a raise in the Town's front foot charge for sewer line extension from $6.00 per linear foot to $15.00 per linear foot. Because the Town should have provided sewer service to the Happy Creek Knolls property by 1983, the higher front foot charge would not have applied to that property had the town abided by the annexation order. The Town had an extension until 1985 to provide sewer to the Industrial Park, however, and so the plaintiffs would not have had the benefit of the lower cost for sewer line extension to that property even if the Town had complied with the order.

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[11] Although the plaintiffs make claims for lost profits and interest income caused by a lack of sewer service, the court need not address them separately. In *Wheeler*, the Eleventh Circuit held that the formula is used for compensating a temporary regulatory taking -- the measure this court has adopted — accounted for landowner's loss of "the property's potential for producing income or an expected profit." *Wheeler III*, 833 F.2d at 271. Moreover, specific claims of opportunity costs clearly fall within the scope of consequential damages which are routinely denied in takings cases. *See Coastland Corp. v. Third National Mortgage Co.*, 611 F.2d 969, 977 (4th Cir. 1979), *Carley Capital Group v. City of Newport News*, 709 F. Supp. 1387 (E.D. Va. 1989). *Cf. Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

The second Town action causing economic damage to the plaintiffs was the passage of a slope ordinance in 1989.[12] Again, had the Town not willfully disobeyed the annexation court's order, the plaintiffs would not have had to comply with the slope ordinance. Because of the ordinance, however, the plaintiffs are unable to develop some of their lots, and additional lots will require a special use permit.

These facts surrounding the plaintiffs' situations present a strong case for which equity and fairness demand compensation for consequential damages. The losses plaintiffs suffered at the hands of the Town government do indeed seem greater than the amount which plaintiffs would recover under the formula endorsed in *Wheeler* and *Nemmers.* Although the Eighth and Eleventh Circuits did not specifically hold that just compensation for a temporary regulatory taking does not include consequential damages,[13] this court sees no reason to invoke an exception to the well-established rule that consequential damages are not recoverable. The facts in this case are indeed compelling ones for this court to attempt to forge new ground in fashioning an appropriate measure of damages by issuing a rule that would grant compensatory damages; however, absent guidance from this circuit to do so, the court will follow the well-reasoned approaches of the Eighth and

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[12] The ordinance prevents development of slopes of 25% or greater and requires a special use permit for development of slopes between 15% and 25%.

[13] Neither court awarded compensatory damages, nor is it apparent that the plaintiffs in those cases asked for such an award.

Eleventh Circuits. Accordingly, the court will not award relief for the plaintiffs' consequential damages.

In addition to the lack of authority for granting consequential damages, another reason exists for denying them in this case. Concededly, because economic evaluations often depend upon assumptions, some amount of speculation is inherent in establishing market values. *United States v. Miller*, 317 U.S. 369, 374 (1943); *Foster v. United States*, 2 Cl. Ct. 426, 446-47 (1983). Nonetheless, a court, in its consideration of just compensation, must be wary of those elements of damages which are speculative and conjectural. *Olsen v. United States*, 292 U.S. 246, 257 (1934); *Foster*, 2 Cl. Ct. at 446. The court finds that the evidence in the record pertaining to consequential damages is not sufficiently founded to be the basis for compensatory relief.

Even if this court concluded that the increase in the front foot charge is a consequential damage for which the owners of the Happy Creek Knolls property could be compensated, the record contains no evidence indicating how many linear feet of sewer line are at issue. Thus, the court could not compute the proper amount of damages suffered due to the higher front foot charge. Likewise, had the court found that the losses attributable to the slope ordinance were compensable consequential damages, the plaintiffs must have proved that they indeed sustained such damages by showing that they would have sold or developed the properties subject to the ordinance before it was passed in order to recover for those losses. If no demand for the affected lots existed before the regulation became applicable, then the plaintiffs suffered no damages because of it. Based on the evidence before it, the court could not find that the lots subject to the slope ordinance would have been sold or developed prior to 1989 even if the lots had sewer. Consequently, the court concludes that, even if it could appropriately award consequential damages, the evidence does not sufficiently establish the extent — if any — to which the plaintiffs sustained such damages.

Having determined the appropriate method for measuring damages, the court must now apply the formula to the case at hand. The plaintiffs offered several experts on the issue of damages. Although the defendants cross-examined these witnesses, they did not present their own experts to testify on damages. They have relied instead on their assertion that the plaintiffs have not been able to complete their subdivisions because of their own failure to comply with various zoning requirements, not because of the Town's failure to provide sewer service. Thus, the defendants argue, their temporary taking did not cause any damages beyond those already resulting from the plaintiffs' noncompliance with applicable regulations. The court believes that this contention is fatally flawed because, to put it in the vernacular, it puts the cart before the horse: it assumes that the plaintiffs would have performed objectively futile activities, hoping that such actions would spur the defendants to meet obligations which, despite a court order, they had refused to do. Consequently, if the plaintiffs' experts' testimony on damages meets acceptable standards for determining the applicable market values, the court will use them to determine just compensation.

The plaintiffs' expert on the market value of the land used a comparable sales approach to determine the value of both properties at the dates of the takings. The comparable sales approach — analyzing sales of similar commercial property in order to arrive at a fair market value — is generally accepted as providing the best evidence of fair market value. *United States v. 179.26 Acres of Land*, 644 F.2d 367, 371 (10th Cir. 1981); *Houser v. United States*, 12 Cl. Ct. 454, 472-73 (1987). The Eighth Circuit has approved the use of the evidence of comparable sales as the "'best evidence' of damages on the rationale that comparable sales "on the whole reflect the principle of a willing seller and a willing buyer concluding arms-length negotiations.' " *Nemmers*, 764 F.2d at 505 (citing *United*

States v. 47.17 Acres of Land, More or Less, 674 F.2d 722, 725 (8th Cir. 1984)).

The comparability of real estate sales involves such factors as time of transaction, location of the property, quantity and quality of property sold, nature of the sale, the primary interests of the parties as well as other factors peculiar to a particular transaction. The plaintiffs' experts engaged in such an examination in order to estimate the fair market values of the properties, both with and without sewer. Because they supported their findings with a strong factual and analytical framework, and as their testimony was essentially unrebutted, the court adopts their figures in order to obtain the appropriate amount of damages.

In 1981, the time of the taking of the McLaughlin property, the fair market value of that property was $148,000 with sewer and $66,000 without sewer, leaving a difference of $82,000. The period of the taking, that time in which the City ought to have provided sewer but did not, extended from January 1, 1981, to October 11, 1989. Applying the applicable interest rates, with interest compounded annually, to $82,000 for the period of December 1981 to October 11, 1989,[14] the court finds that the amount of just compensation is $176,526.56.

In 1985, the time of the taking of the Industrial Park property, the fair market value of that property was $405,000 without sewer and $810,000 with sewer, leaving a difference of $405,000. Because the record shows that sewer lines run through three of the sixteen lots in the Industrial Park, and as the evidence does not show the value of the remaining thirteen lots with and without sewer service at the time of the taking, the court will reduce the $405,000 difference in value by three-sixteenths, leaving an amount of $329,062.50. The period of the taking has extended from January 1, 1985 to the present time. Again using the interest rates indicated above, the just compensation for the Industrial Park property to date is $489,072.59. The owners of the Industrial Park property shall continue to receive compensation, determined as this court has outlined, until the defendants cease their taking and provide the sewer service mandated by the annexation court.

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[14] The plaintiff's experts provided the market rates of return through December of 1988. Because the record contains no evidence of the applicable interest rates from December 31, 1988 through the present, the court has used the Administrative Office of the United States Courts 52-week Treasury Bill Rate Table of Changes to determine the appropriate amount of interest accrued after January 1, 1989.

B. Punitive Damages

The Supreme Court has endorsed punitive damages awards in § 1983 actions. *Smith v. Wade*, 461 U.S. 30, 51 (1983). Such damages are appropriate when the defendants violate federal law with evil motive or intent, or when they act with "reckless or callous disregard for the plaintiff's rights" *Id.*

The Fourth Circuit summarized the Supreme Court's precedent for awarding punitive damages in *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, (4th Cir. 1988). The appellate court stated that such damages are "an extraordinary remedy . . . designed to punish and deter particularly egregious conduct." *Id.* at 489 (citing *City of Newport v. Fact Conceris, Inc.* 453 U.S. 247, 268 (1981)). In *Cooper v.Dyke*, 814 F.2d 941, 948 (4th Cir. 1987), the court discussed the standard for awarding punitive damages, stating, "the callous indifference required for punitive damages is essentially the same as the deliberate indifference required for a finding of liability on the § 1983 claim." Although this court's determination that the defendants effected a deprivation of the plaintiffs' rights under § 1983 and the equal protection clause could support a punitive damages award, *see Smith*, 461 U.S. at 51-55; *Cooper*, 814 F.2d at 948, the evidence on record does not satisfy this court that such an award is meritorious. The plaintiffs' contention that the defendants need only act with "reckless or callous indifference to the [plaintiffs'] federally protected rights" is correct; they need not show malicious or evil intent. *Piver v. Pender County Bd. of Education*, 835 F.2d 1076, 1082 (4th Cir. 1987).

In its opinion granting summary judgment on the taking issue, this court concluded that the "defendants ought to have known, and that a reasonable person in their shoes would have known, that the defendants were under a legal obligation to provide sewer service to the parcels in question." *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*, and *McLaughlin, et ux., v. Town of Front Royal*, 708 F. Supp. 1477, 1482 (W.D. Va. 1989). However, this court did not make a finding regarding the defendants' malicious intent or callous indifference. The same is true regarding the equal protection claim. The basis for this court's summary judgment on the equal protection claim was not that the defendants had acted with "invidious discrimination", but because no permissible state interest existed to which defendants' decision could bear a rational relationship. *Id.* at 1487. After reviewing the evidence on damages, the court reaches the same conclusions as to the defendants' subjective intent.

The record contains no evidence showing that the four council members who actually voted on the plaintiffs' application for sewer service were reckless or callously indifferent to the plaintiffs' rights. The Mayor and the Town Manager testified about the meetings at which the council discussed the applications for sewer, but the court cannot attribute their testimony to the voting members of council. Nor can the court base an award of punitive damages on inferences that the defendants acted egregiously or with malice. *Stephens*, 848 F.2d at 492. Though the evidence does show that the Town Attorney told the council, "You are required to provide [sewer] to whoever wants it within the entire annexed areas", the record does not sufficiently demonstrate that the defendants acted contrary to their understanding — however skewed or incorrect it may have been — of this advice. As to the Town Manager and Mayor Marlow, neither voted on the sewer service applications. Moreover, the strong evidence of Mayor Marlow's purported bad faith is contradicted by the factual differentiations between his application for sewer and those of the plaintiffs. Although the court is not completely convinced that the plaintiffs' allegations of corruption, impropriety and graft on the part of the defendants are without some merit, the record does not contain the substantially high measure of evidence necessary for a punitive damages award. Consequently, the court will not award punitive damages.

Because the plaintiffs brought these actions under 42 U.S.C. § 1983, the court has discretion to award attorneys fees to the prevailing party under 42 U.S.C. § 1988. The court believes that this is an appropriate case for such an award. The Front Royal-Warren County Industrial Park, Inc., expended $68,096.25 for legal fees and costs in this litigation as of December 4, 1989. The plaintiffs in the *McLaughlin* case incurred similar expenses of $39,371.30 through the same date. The court hereby orders such amounts, plus any additional fees incurred from December 4, 1989 to the present date as may be shown to the court, to be paid by the defendants as reasonable attorney's fees.

An appropriate order shall this day issue.

ENTERED: /s/ James H. Michael, Jr.
Judge

October 22, 1990
Date

A TRUE COPY, TESTE:
JOYCE F. WITT, CLERK
BY: /s/ P. Hensley
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 87-0019-H

FRONT ROYAL AND WARREN COUNTY
INDUSTRIAL PARK CORPORATION,
Plaintiff

v.

TOWN OF FRONT ROYAL, VA, et al.,
Defendants

Civil Action No. 87-0020-H

Judge James H. Michael, Jr.

FRED W. McLAUGHLIN, et ux.,
Plaintiffs

v.

TOWN OF FRONT ROYAL, VA, et al.,
Defendants

Clerk's Office U.S. Dist. Court
at Harrisonburg, VA

Filed

MAR 16, 89

Joyce F. Witt, Clerk
By: /s/ P. Hensley
Deputy Clerk

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that:

1. Defendants' motion for summary judgment shall be, and it hereby is, denied.

2. Plaintiffs' motion for summary judgment shall be, and it hereby is, granted.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge

March 16, 1989
Date

A TRUE COPY, TESTE
JOYCE F. WITT, CLERK
BY: /s/ P. Hensley
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA HARRISONBURG DIVISION

Civil Action No. 87-0019-H

FRONT ROYAL AND WARREN COUNTY
INDUSTRIAL PARK CORPORATION,
Plaintiff

v.

TOWN OF FRONT ROYAL, VA, et al.,
Defendants

Civil Action No. 87-0020-H

Judge James H. Michael, Jr.

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Plaintiffs

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MEMORANDUM OPINION

This matter is presently before the court on cross motions for summary judgment. For the reasons elaborated below, defendants' motion for summary judgment is denied and plaintiffs' motion for summary judgment is granted.

I.

The plaintiffs in this matter are the Front Royal and Warren County Industrial Park Commission and two Front Royal, Virginia land owners. Plaintiffs own parcels of land in an area annexed by the Town of Front Royal under separate Annexation Court orders of 1976 and 1978. The orders of annexation directed the Town of Front Royal to extend sewer service to the parcels of land covered by the annexation orders as expeditiously as was practicable and, in any event, within five years of the entry of the orders. Since the Town of Front Royal has not yet extended sewer service to the annexed parcels owned by plaintiffs, plaintiffs seek to vindicate their rights under the fifth and fourteenth amendments and 42 U.S.C. § 1983 through this consolidated action.

Plaintiffs allege that the refusal by defendants to extend sewer service to their parcels has deprived plaintiffs of all economically viable uses of their property. In addition, plaintiffs also contend that their right to equal protection of the law has been violated because, while defendants provided sewer service to land owners whose parcels in the annexed area were situated similarly to plaintiffs' parcels, defendants have refused to extend the sewer lines to instant plaintiffs' parcels. Defendants have offered several affirmative defenses, among them the defenses of absolute legislative immunity and executive qualified immunity. By an earlier order of this court dated February 22, 1988, this court granted plaintiffs' motion to strike the affirmative defense of legislative immunity and, conversely, denied defendants' motion to dismiss on the grounds of legislative immunity.

Defendants entered an interlocutory appeal before the Fourth Circuit Court of Appeals in regard to the dismissal of their claim of absolute legislative immunity. After noting that the denial of a claim of absolute immunity is appropriate for interlocutory appeal, the Fourth Circuit concluded that "We agree with the district court that defendants' decisions had to do with zoning enforcement rather than with rule making." *Front Royal and Warren County Industrial Park Corp., et al. v. Town of Front Royal, Virginia, et al.*, No. 88-2066, slip op. at 5 (4th Cir. Jan. 9, 1989). Therefore, the Fourth Circuit found that "The district court was correct to conclude that the defendants' decisions were not legislative" and, thus, defendants were not entitled to a defense of absolute immunity. *Id.* at 4.

II.

Defendants also offer the affirmative defense of qualified executive immunity. Earlier, this court had denied plaintiffs' motions to strike the qualified immunity defense (and, concomitantly, denied defendants' motion to dismiss on the basis of the qualified immunity defense) because "The court finds that the present record provides an inadequate basis for making such a determination." *Front Royal and Warren County Industrial Park Corp., et al. v. Town of Front Royal, Virginia, et al.*, CA Nos. 87-0019-H and 87-0020-H, slip. op. at 4 (W.D. Va. Feb. 22, 1988). After recourse to materials not available within the confines of a motion to dismiss and after consideration of the briefing materials submitted, the court finds that defendants' claim of qualified immunity is an issue which is ripe for disposition on summary judgment. Accordingly, the court finds that defendants are not entitled to the defense of qualified immunity and therefore now denies that portion of their motion for summary judgment.

Qualified immunity is, in essence, the right not to have to stand trial if, among other conditions, the acts at issue were performed by defendants within the context of their official, executive capacity. As the Fourth Circuit Court of Appeals has held,

> Qualified immunity thus protects government officials not only from liability, but from *trial*, in recognition of the fact that subjecting officials unnecessarily to trial leads to 'distraction of officials from their governmental duties, inhibition of discretionary action, and deterrance of able people from public service.'

Turner v. Dammon, 848 F.2d 440, 444 (4th Cir. 1988) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)) (emphasis in original). Qualified immunity is largely a matter of getting the incentives right in order to provide the proper context within which government officials can conscientiously discharge their duties without fear of harassment through litigation and, at the same time, they can be held liable for the violation of a clearly established constitutionally-protected right. If an official had no recourse to qualified immunity, the Damoclean sword of potential litigation would always push the official in favor of inaction, for "the person aggrieved by official actions may be quite willing to sue but the losses to society as a whole that come from official inaction may be more diffuse and thus less likely to result in a lawsuit." *Turner*, 848 F.2d at 444. The scope of this protection has been set out by the Supreme Court in *Harlow*. In that decision, the Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. Recently, the Fourth Circuit has summarized the test for qualified immunity in this way, "Public officials . . . are clothed with qualified immunity in the performance of discretionary functions when the action does not violate clearly established statutory or constitutional rights of which the official knows or reasonably should be aware." *Bright v. McClure*, No. 88-3974, slip op. at 5-6 (4th Cir. Jan. 17, 1989).

As *Harlow* has indicated and as a number of subsequent decisions have reaffirmed, the standard for an official seeking to shield himself under the qualified immunity defense is an objective and not a subjective standard. 457 U.S. at 818; *see also Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987). The issue is not whether the official in question actually knew that he was violating a right of the plaintiff, but whether a reasonable person in that official's place would have known that such a right was being violated. *Turner*, 848 F.2d at 443; *Young v. Lynch*, 846 F.2d 960, 963 (4th Cir. 1988). The question is one of "whether an official acting under the circumstances at issue reasonably could have believed that his action did not violate the constitutional rights asserted." *Sevigny v. Dicksey*, 846 F.2d 953, 956 (4th Cir. 1988). As Justice Powell, in writing for the Fourth Circuit, has noted, the question of the applicability of qualified immunity has no reference at all to the actual good faith of the official, but rather simply to the objective test as outlined in *Harlow* and its progeny. *Lane v. Griffin*, 834 F.2d 403, 408 (4th Cir. 1987). Thus, the issue is not what the instant defendants believed but merely what reasonable people in the defendants' position would have believed about whether the acts in question violated plaintiffs' rights.

However, it is not necessary for this court to inquire deeply into the objective standard and ask what a reasonable person in instant defendants' position would have known, for another component of the qualified immunity defense is lacking in the defendants' position. The qualified immunity defense applies to government officials who are performing "discretionary functions." *Anderson*, 403 U.S. at____ , 107 S.Ct. at 3038. In order to make use of qualified immunity protection, defendants would have to show that their provision of sewer lines to the annexed area — or their refusal to provide such lines — was a discretionary function appropriate to an executive, and not a mere ministerial act. Using both the common language understanding of discretionary acts as well as the standards normally applied by courts, this court finds that the provision of sewer lines, under the specific aegis of two very explicit annexation orders, was not a discretionary function emblematic of the executive and suitable for qualified immunity, but was indisputably a ministerial function.[1]

Defendants argue that the provision of sewer lines for the annexed area is a discretionary function and attempt to rely on comments from the bench made in the context of the reconvening of the Annexation Court in 1984 as evidence that the Annexation Court intended to leave with defendants a degree of discretion, not merely in the timing but also in the actual provision of sewer lines to parcels of land in the annexed area. Defendants' Reply Memorandum In Support of Defendants' Motion for Summary Judgement and in Opposition to Plaintiffs' Motion for Summary Judgment, as 12-13. Defendants argue that because Judge Moon of the Annexation Court opined that it would not be reasonable for plaintiffs to force defendants to blast through rock at the cost of several million dollars per lot in order to provide sewer lines, defendants are free to exercise their discretion and engage in sweeping cost-benefit analysis for the provision of any sewer service to plaintiffs' lots. *Id.* at 13.

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[1] One federal court has defined "discretionary function" in this way: "Discretionary functions have been defined as those in which a government official determines what action to take based on an individual, case-by-case analysis and in which his decision includes elements of judgment and discretion." *Biscayne Fed'l Savings & Loan Assoc. v. Pratt*, 646 F. Supp. 371, 376 n. 8 (D.C.D.C. 1986). The clear mandates of the Annexation Court left defendants without the leeway for judgment and analysis necessary to convert the provision of sewer service to the annexed area into a discretionary function.

Two responses are appropriate to this contention by the defendants. First, it is important to note that the situation about which Judge Moon spoke was obviously an extreme hypothetical, a situation far different from that presented by the facts in the case before this court.[2] Furthermore, Judge Moon went on to say that "They [defendants] have to exercise that discretion reasonably and in accordance with the representations they have made here." *Id.* Here, he was referring to representations by defendants that sewers would indeed be provided to those parcels affected by the annexation order. *Id.* Judge Moon went on to note that the original annexation order was quite clear and that the deliberations of this reconvened Annexation Court did not uncover any significant ambiguity in the terms of that original annexation order. *Id.*

Second, as this court will note in greater detail *infra*, the terms of the annexation orders are specific and clear and therefore suffice to undercut defendants' claim that the provision of sewer lines to the parcels owned by plaintiffs could be considered an act of discretion. In rejecting defendants' attempt to shield themselves with the defense of absolute immunity, the Fourth Circuit concluded that "The order of the Virginia Annexation Court removed what discretion defendants might otherwise have had to approve or decline plaintiffs' requests for sewer service." *Front Royal and Warren County Industrial Park Corp.*, slip op. at 5.[3] Even though the Fourth Circuit made this observation within the context of ruling on the absolute immunity claim and did not address the merits of the qualified immunity claim in their opinion, this court finds that their characterization of the lack of the element of discretion in the provision of sewer lines to plaintiffs' parcels is of considerable guidance in reaching the issue before us.

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[2] Judge Moon observed that, "Well, I think they will have to exercise some discretion, because certainly you [plaintiffs] are not going to make them go out there and blast through rock that is going to cost several million dollars to develop a single lot." Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, at 13. There is absolutely no evidence in the record that provision of sewer service to any of the lots in the annexed area would involve a cost-to-benefit ratio which could even remotely resemble Judge Moon's hypothetical, despite defendants' plea that having to provide sewer service to the annexed area, under the annexation orders, "would spell financial disaster for the Town." *Id.* at 11. Such a claim is simple, overheated hyperbole.

Even if one were to construe, as this court does not, the provision of sewer service for the parcels in question as a discretionary function, still this court would find the defendants are unable to utilize the shield of a qualified immunity defense. Defendants claim that they acted in good faith in refusing to provide sewer service to plaintiffs' parcels because they did not believe that they were under any obligation to provide such service. However, since the relevant legal test for determining the applicability of qualified immunity is an objective and not a subjective standard, claims by the defendants about what they knew or believed to be the case are beside the point. The legal standard is what someone, standing in shoes of the defendants, ought to have realized about the rights of the plaintiffs and the defendants' legal obligations to the plaintiffs. Examining the explicit and clear language of the annexation orders and noting that the Town's legal officer had repeatedly advised defendants that the orders of the annexation court required the provision of sewer service to the plaintiffs' properties, this court concludes that defendants ought to have known, and that a reasonable person in their shoes would have known, that the defendants were under a legal obligation to provide sewer service to the parcels in question. The advice given to defendants by their own counsel, the Town's legal officer, over a period of several years was on occasion blunt and specific, advising defendants that the order of the annexation court brooked no interpretation, and that provision of sewer service to the lands of plaintiffs and to the lands of others in the annexed area who sought the service was, in a word, required. This bears dispositively on the question of whether the defendants should reasonably have known of the legal obligation created by the annexation order. Thus, this court finds that defendants are singularly ill-placed to attempt to make use of a qualified immunity defense.

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[3] This court is fully aware that the Fourth Circuit ruled simply on the absolute immunity defense and that that defense is an issue quite separable from the question of qualified immunity. The Fourth Circuit did take care to note that "Our decision accordingly reflects no opinion on the applicability or effect of the qualified immunity defense." *Front Royal and Warren County Industrial Park Corp.*, slip op. at 4, n. 3.

III.

Plaintiffs seek summary judgment under a claim that the refusal of defendants to extend the sewer lines deprived the plaintiffs of constitutionally protected property rights. Plaintiffs argue that defendants' culpable omission was an action under color of state law and constitutes a compensable taking.

Defendants respond to this charge by arguing that plaintiffs have not been deprived of *all* possible usages of their land. Further, defendants contend that plaintiffs should not be able to maintain a federal cause of action since adequate state remedies exist for plaintiffs to pursue. For instance, presumably, plaintiffs could seek to have the Annexation Court reconvened, for yet another time. In the alternative, defendants argue that plaintiffs are free to maintain an independent state cause of action to seek redress.

However, it is proper for plaintiffs to be before this court on a takings claim under 42 U.S.C. § 1983. Clearly, the defendants acted under color of state law and, further, this court finds that said action (the action in this case consisting of an omission or a denial of a request for a required action) did deprive plaintiffs of property rights and does constitute a taking. A restriction on the use which can be made of property can result in a taking without compensation and, thus, would qualify a plaintiff for redress.[4] *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). It is true, as defendants implicitly argue, that the taking or restriction on the use of plaintiffs' property is temporary in that the origin of plaintiffs' claims would be undercut if sewer service were to be provided in the future.[5] While that observation is true, it is not determinative of the takings issue, for redress is available even in the instance of what can be arguably construed as a "temporary" taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378 (1987).[6]

In addition, this court finds it is not established that adequate state remedies exist for the plaintiffs. Plaintiffs are not able to force, at least unilaterally, a reconvening of the Annexation Court. Even if the plaintiffs were in a position to obtain through their own efforts a reconvened Annexation Court, that court would not be equipped to provide the necessary relief for these plaintiffs since annexation courts have only limited remedies at their disposal. An annexation court in Virginia is a creature of statute and not a court of general jurisdiction. *Town of Christiansburg v. Montgomery County*, 216 Va. 654, 222 S.E.2d 513 (1976).

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[4] As Justice Holmes concluded, for the Court, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[5] This is not to suggest that plaintiffs' claims would evaporate if sewer lines were installed, for the issue of past damages suffered by plaintiffs still would remain. As the Supreme Court has recently concluded, "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, ___; 107 S.Ct. 2378, 2389 (1987).

[6] This court notes that the opinion of the Supreme Court in *First Englist Evangelical Lutheran Church* effectively prevents defendants from relying on *Agins v. Tiburon*, 447 U.S. 255 (1980), to argue that the temporary nature of the interference with the use of the property in question removes it from the category of a taking.

In this court's view, there is no need for the Annexation Court to reconvene vet again. Its original orders were clear and when it was previously reconvened it not only reaffirmed those orders but it indicated that the directives regarding the provision of sewer lines in those orders were also clear. Defendants attempt to argue that the annexation order contains language which is either conditional or sufficiently ambiguous in order to justify its position that defendants were under no legal obligation to provide sewer lines to parcels of the plaintiffs. However, the annexation order of December 31, 1976, contains the following language:

> *Sewer Facilities*: The Town of Front Royal shall proceed to construct interceptor and collector sanitary sewer lines in the areas herein decreed to be annexed as shown for such areas on Town Exhibit 13, the lines as shown on said exhibit for the annexation area hereby decreed shall be installed as soon as they become reasonably necessary and it becomes economically feasible so to do to serve the residents of the annexation area, *but said improvements shall in any event be completed within five years from the effective date of annexation.*

Order of the Special Court, ¶ 5(c) (2), page 4, Dec. 31, 1976, (emphasis added). The 1978 Annexation Decree contains parallel language regarding the provision of sewer lines. Defendants argue that the constraints of reasonable necessity and economic feasibility operate as conditions which bracket and define their entire set of ultimate legal obligations to plaintiffs. Defendants maintain that "The terms of the annexation decrees mandate no more than that the town treat requests for sewer extensions in the annexed area just like a request from anywhere else within the Town." Defendants Reply Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, 10-11.

Therefore, defendants conclude that considerations of economic feasibility could justify never extending sewer lines to the plaintiffs' parcels. This is clearly contrary to the plain language of the annexation orders. Those orders set out a *terminus ante quem* for the provision of sewer service and cost-benefit analysis can operate only within the temporal boundary set by that terminus. The two annexation orders establish that the Town is obligated to provide sewer service to the parcels in question within a certain period and, while the speed with which the sewer lines are extended may be constrained by an equation of cost and benefit during the five-year period specified by each order, it is clear that any such calculus is meant only to operate prior to the expiration of each five-year period. When the annexation orders cite the constraints of necessity and feasibility, that phrase of the orders suggests a mandate which has the aura of "all deliberate speed." It is nevertheless clear that the discretion granted to defendants expired within five years of the annexation orders. In order for defendants to construe the annexation orders as they wish, they must rely on an interpretation which runs directly contrary to the clear and unambiguous language of the orders.[7] In short, the defendants can sustain this position only by eliminating from the annexation orders the language quoted *supra*, namely, "but said improvements shall in any event be completed within five years from the effective date of annexation."

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[7] This case is to be distinguished from those cases where the annexation orders are very general in terms and grant localities what is in effect an open ended arena for discretion. For example, the annexation orders which establish the legal rights of instant plaintiffs are very different from the order at issue in *City of Staunton v. Cash*, where

(Footnote Continued)

Normally, the question of whether there has been a taking would be an issue for the trier of fact, but the affidavits offered reveal that there can be no dispute that plaintiffs' parcels are worth so much less that they have been deprived of property rights. Therefore this court finds, as a matter of law, there was a taking for which plaintiffs are entitled to compensation. However, while this court finds that there can be no genuine dispute about an issue of material fact which would establish that there was a taking, there is such a dispute about the amount of damages which would be appropriate to award in this case. Therefore, while the court finds that there was a taking for which defendants are liable, the court also finds that it is not appropriate within the context of summary judgment to determine the extent or amount of liability. As plaintiffs concede in their motion for summary judgment, this issue must be reserved for the trier of fact.

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the Supreme Court of Virginia found that

> While the annexation decree clearly imposed upon the City a duty to make improvements in the annexed area, we do not agree that the duty was of the absolute nature asserted by [the defendants]. The decree did not require the City to make any particular improvement at any given time. Expressing in general terms the duty imposed, the decree left to the City, in the exercise of discretion, the determination of what improvements should be made and when they should be accomplished. The decree contemplated that, in exercising this discretion, the City properly should consider the public necessity of proposed projects and the economic feasibility of suggested undertakings.

220 Va. 742, 747, 263 S.E. 2d 45, 49 (1980).

IV.

Plaintiffs allege that their rights have been violated under the fourteenth amendment of the United States Constitution in its equal protection clause. They argue that sewer service was provided to other properties which were similarly situated to the parcels owned by the plaintiffs. Therefore, to deny sewer service to plaintiffs' parcels would constitute unlawful, unequal treatment. In evaluating plaintiffs' equal protection claim, it is necessary to distinguish between what may be a denial of equal treatment and what is a legally cognizable denial of equal protection of the law. For example, burdening citizen X and not burdening citizen Y when both citizens are members of the same general class may be unequal treatment, but it is not necessarily a denial of equal protection. Often, equal protection refers to violations in regard to certain suspect classifications such as gender or sex. Instant plaintiffs' equal protection claim involved a different kind of classification and must call for a different type of scrutiny or analysis by the court.

Defendants argue that there has been no equal protection violation because the factors which led to a denial of sewer service to plaintiffs' parcels are those factors which are appropriate to consider in making decisions about utility extensions. They argue that other municipalities can consider costs in deciding whether to extend sewer lines. One initial problem with defendants' argument is that the other municipalities to which defendants are comparing themselves may not be under an explicit, detailed order of an annexation court to provide sewer lines. Therefore, it would misconstrue the legal situation for these defendants to be considered as operating with a blank slate or in the same position as any other municipal corporation. Defendants are correct when they note that legislative activity involving land management and similar decisions has uniformly been held to merit considerable deference from courts. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1973).[8]

But, the actions of the defendants are not legislative activities, but are nondiscretionary ministerial functions carried out under the aegis of a specific, detailed court order. The defendants are arguing that the decision not to extend sewer service must be considered as a garden variety municipal services decision. Yet, the annexation orders which form the legal backdrop to this entire matter mean that the defendants are not free simply to engage in a cost benefit analysis or to weigh the factors which municipalities ordinarily weigh when they consider whether to extend sewer service.

In the area of economic regulation, regulations which are challenged as violating equal protection clause are not subject to strict scrutiny by the courts. Rather, the Supreme Court has stated that

> Unless the classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. . . . [I]n the local economic sphere, it is only the invidious sphere, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (citations omitted). In order to prevail on a motion for summary judgment under an equal protection claim, plaintiffs would have to show that there was no rational relationship between a legitimate state interest and the decision not to provide sewer lines to plaintiffs' parcels—that the defendants' refusal to provide sewers was invidious and wholly arbitrary.

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[8] In this case, the Supreme Court concluded that "We deal [here] with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.'" *Village of Belle Terre v. Boras*, 416 U.S. 1, 8 (1973) (citations omitted).

In ferreting out the existence of a rational relationship between the defendants' decision and state interests, it is important to note that it is "a legitimate state interest," *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) or "a (permissible) state objective," *Village of Belle Terre v. Boraas*, 416 U.S. 1,8 (1973), to which a rational relationship must point. Obviously, avoiding the mandate of the order of the annexation court or preferring certain property owners for private, self-referential reasons cannot quality as a "legitimate" or "permissible" state interest. To what legitimate or permissible state interest could defendants point? Most equal protection challenges which are adjudicated under the rational relationship standard fail, in large measure because the vast majority of defendants in those cases are operating within the normal legal context where a panoply of possible state interests can be cited. However, as noted *passim*, instant defendants are operating within a more constricted legal universe. State interests which, in other settings, would be considered legitimate or permissible and would serve to vindicate a legislative (or administrative) decision are not available to instant defendants because of the orders of the annexation court. These orders rightfully circumscribe the range of decisions which defendants can lawfully make. Absent the explicit orders of the annexation court, defendants could point to the results of cost-benefit analysis to justify their decision not to extend sewer service. However, by the very terms of the annexation orders, defendants are no longer free to cite such considerations to justify their refusal to extend sewer service.[9] Further, the provisions of the annexation orders are not subject to challenge as being arbitrary or capricious or overreaching, for those provisions were reflections of assurances given to the annexation court by the Town in the course of the annexation proceedings.

Were this court faced only with a common law claim that defendants were obligated to provide sewer service to plaintiffs' parcels, the outcome of the equal protection challenge might be quite different. Defendants do allege, through affidavit, that they based their decision not to extend the sewer lines on the sort of garden-variety economic factors which courts historically conclude merit judicial deference. Defendants' Memorandum in Support of Motion for Summary Judgment, 8-10. Reading this testimony in the light most favorable to defendants, as this court must do in passing on plaintiffs' motion for summary judgment, we find that the purposes articulated by defendants for their refusal to extend sewer service cannot count as legitimate state interests, given the legal mandate imposed upon the town by the annexation orders. Defendants allege that "The terms of the annexation decrees mandate no more than that the Town treat requests for sewer extensions in the annexed area just like a request from anywhere else within the Town." Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, 10-11. Such is a manifestly incorrect interpretation of the annexation orders. Parcel holders in the annexed area do not stand in the same relationship to the town as those from the original portion of the town seeking sewer service. Defendants do not point to any other state interest which could qualify as a permissible anchor for the rational relationships which would justify defendants' decision to treat plaintiffs differently from (i.e., unequally) other parcel holders in the annexed area. By defendants' own evidence, this court finds that defendants have identified no permissible state interest which would allow them to survive plaintiffs' motion for summary judgment.

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[9] This court takes note, once again, of Judge Moon's hypothetical where he opined that, if it would require blasting through rock and cost several million dollars, defendants could exercise some discretion. *See infra.* However, no evidence has been offered which would suggest that the situation in any way begins to approach the extreme hypothetical constructed by Judge Moon. For all practical purposes, and certainly for the purpose of this case, defendants do not have the discretion to decline to provide sewer service to plaintiffs' parcels on the basis of cost and, thus, the expense involved in the provision of sewer service cannot count as a legitimate or permissible state interest.

Since the only explanation for the refusal to extend sewer service which is offered by defendants cannot count as a legitimate state interest, this court is obligated to determine if there are other conceivable state interests which defendants could advance. The traditional test for assessing the viability of the rational relationship is not only whether the state has articulated a rationale, but whether there is a conceivable basis for a rational relationship. *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983).[10]

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[10] Thus, the Supreme Court concluded that "[W]e think the Alabama legislature *could have reasonably determined* that the royalty-owner exemption would encourage investment in oil or gas production." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (emphasis added). *See also Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 529 (1959). By the same token, the Court has also struck down classifications, on the basis of the rational relationship test, when it discerned impermissible purposes behind the classification. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 622-23 (1985) (New Mexico cannot grant a special tax exemption to Vietnam veterans only if they were residents of the state before a certain arbitrary date); *Zobel v. Williams*, 457 U.S. 55 (1982) (Alaska cannot use length of residency as a differential in distributing dividends from state's oil reserves). As the Court concluded in *Zobel*, the state's objective "to reward citizens for past contributions" cannot count as "a legitimate state objective." 457 U.S. at 63. (The Alaska legislature had pointed to two other objectives, but the Supreme Court found that

This court can construct no possible rationales for defendants' refusal, in the face of a clear court order, to extend the sewer line except for reasons which "constitute[ ] the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985). The issue is not the absence of a rational relationship between defendants' denial of sewer service and reasons for that denial — what is missing is a *legitimate* or *permissible* state interest vindicated by that denial.

Plaintiffs allege, in effect, that there was a conspiracy among the defendants to provide sewerage to certain parcels for personal benefit and to deny it to plaintiffs. While there is some evidence that this may have been so, the record does not provide the basis for a finding, under Rule 56, that there was invidious discrimination by defendants against plaintiffs because there are disputes regarding issues of material fact which relate to defendants' motivation in providing sewers and the effect of providing the sewer lines to some parcels and not to others. However, it is not necessary to find uncontroverted evidence of a conspiracy by defendants to reduce the value of plaintiffs' parcels or to impermissibly deny to plaintiffs sewer service, for defendants themselves have not been able to identify any permissible state interest to which defendants' decision could bear a rational relationship nor could there feasibly be any such interest, given the strictures placed upon defendants by the annexation orders. It is conceded by this court that state actions are only very rarely struck down on equal protection grounds under the rational relationship standard. Yet, in this case, it is clear to the court that defendants were under such a strictly constructed judicial mandate that the interests to which a

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those objectives were not advanced by the legislative scheme and the Court noted that, in upholding the law and applying it retroactively to 1959, the Alaska Supreme Court relied solely on the state interest which was identified as impermissible. *Id.* at 62-63.)

rational relationship might ordinarily refer are simply inaccessable to instant defendants. Therefore, this court grants plaintiffs' motion for summary judgment on the basis of a violation of their right to equal protection of the laws and, likewise, denies defendants' motion for summary judgment on this point.

V.

Defendants seek summary judgment because they argue that these actions are time barred. They contend that the statute of limitations for § 1983 actions is two years and that, since the sewer lines were required to be installed within five years of the annexation orders and those orders are dated 1976 and 1978, the statute of limitations on the actions would have run in 1983 and 1985 respectively. This court has previously considered the statute of limitations defense offered by defendants and has found that, since there was a continuing wrong, plaintiffs' actions are not time barred. To this extent, the court reaffirms and adopts its decision and the reasoning supporting that decision in its Order and Memorandum Opinion of February 22, 1988.

VI.

In conclusion, the court denies defendants' motion for summary judgment on the basis of the qualified immunity defense and grants plaintiffs' motion for summary judgment in finding that defense to be inapplicable. The court grants plaintiffs' motion for summary judgment as to the existence of a compensable taking by defendants, reserving the question of the amount of appropriate damages for trial. As regards plaintiffs' claim of denial of equal protection, this court grants plaintiffs' motion for summary judgment and denies defendants' motion for summary judgment, also reserving for trial the question of damages on this claim. Finally, this court denies defendants' motion for summary judgment on the basis of a statute of limitations defense.

An Appropriate Order shall this day issue.

/s/ James H. Michael, Jr.
Judge

March 16, 1989
Date

A TRUE COPY, TESTE
JOYCE F. WITT, CLERK
BY: /s/ P. Hensley
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CIVIL ACTION NO. 87-0019-H

CIVIL ACTION NO. 87-00120-H
JUDGE JAMES H. MICHAEL, JR.

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PART CORPORATION,
Plaintiff
v.
TOWN OF FRONT ROYAL, VA, et al.,
Defendants
FRED W. McLAUGHLIN, et ux.,
Plaintiffs
v.
TOWN OF FRONT ROYAL, VA, et al.,
Defendants

FILED
FEB 22 88
JOYCE F. WITT, Clerk
By: Deputy Clerk

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. Plaintiffs' motions to strike the affirmative defenses of statute of limitations, legislative immunity, lack of standing, *res judicata*, and failure to exhaust state remedies shall be, and they hereby are, granted.

2. Plaintiffs' motion to strike the defense of laches in Civil Action No. 87-0020-H shall be, and it hereby is, granted.

3. Plaintiffs' motions to strike the defenses of qualified immunity, failure to state a claim against defendants Marlowe and Bentley, and failure to show deprivation of property shall be, and they hereby are denied.

4. Defendants' motions to dismiss based on the grounds of statute of limitations, legislative immunity, qualified immunity, collateral estoppel, failure to state a claim as to defendants Marlowe and Bentley, failure to state a claim as to equal protection violations, failure to state due process claims, and failure to state claims for inverse condemnation shall be, and they hereby are, denied.

5. Defendants' motions to dismiss the claims for punitive damages against the Town of Front Royal shall be, and they hereby are, granted.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: ________________
JUDGE

February 22, 1988

Date
A TRUE COPY, TESTE
JOYCE F. WITT, CLERK
By: D. Rhodes
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CIVIL ACTION NO. 87-0019-H

CIVIL ACTION NO. 87-0020-H
JUDGE JAMES H. MICHAEL, JR.

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION,
Plaintiff
v.
TOWN OF FRONT ROYAL, VA, et al.,
Defendants
FRED W. McLAUGHLIN, et ux.,
Plaintiffs
v.
TOWN OF FRONT ROYAL, VA, et al.,
Defendants

FILED
FEB 22 88
JOYCE F. WITT, Clerk
By: Deputy Clerk

MEMORANDUM OPINION

These companion cases come before the court on motions to strike filed by the plaintiff and motions to dismiss filed by the defendant. Because the motions filed in the two cases were virtually identical, the court held one hearing and is issuing one opinion. Because several questions are common to motions made by both sides, the court will proceed by addressing each issue in turn, noting its relevance to the motions made by the parties. Where materials outside the pleadings have been received and considered with respect to an issue, the court will treat the relevant motion as a motion for partial summary judgment.

Statute of Limitations and Laches

The statute of limitations for § 1983 actions is the limitation of the forum state for personal injury actions. *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The Code of Virginia provides a limitation of two years for personal injury actions. Va. Code § 8.01-243. For reasons the court cannot discern, defendants assert that the cause of action arose in Civil Action 87-0020 on December 31, 1981, but that the cause of action in Civil Action 87-0019 did not arise until December 27, 1985. This latter date was less than two years before the complaints were filed; thus, plaintiffs' motion to strike the statute of limitations defense in Civil Action 87-0019 should be granted on the face of the pleadings.

In both cases, the court finds that plaintiffs have made out a claim for a continuing violation and continuing injury. *Cf. Ocean Acres, Ltd. v Dare County Bd. of Health,* 707 F.2d 103 (4th Cir. 1983). In addition, the court finds that the plaintiffs had good reason to believe that sewer service would be provided until they were notifed othewise in a letter from the City Manager on June 10, 1986. The complaints were filed well within two years of that date. For these reasons, the court will deny the defendants' motions to dismiss based on the statute of limitations grounds and will grant plaintiffs' motions to strike the defense. In addition, the court will grant plaintiffs' motion to strike the defense of laches, which was pled only in Civil Action 87-0020.

Immunities

Defendants have raised three immunity defenses. The first is that members of the Town Council enjoy absolute immunity from damage suits under § 1983 for legislative acts. *Bruce v. Riddle,* 631 F.2d 272 (4th Cir. 1980). Such immunity applies to local legislators only when they "function in a legislative capacity." *Id.* at 279. Applying this functional task in *Scott v. Greenville County,* 716 F.2d 1409, 1422-23 (4th Cir. 1983), the Court of Appeals for the Fourth Circuit determined that a county council functioned in an executive capacity when it denied an application for a building permit. In the present case, the Town Council's denial of a request for sewer services to a specific site must likewise be considered an executive act, particularly in light of the annexation court's order that such services be provided. Accordingly, this court will grant plaintiffs' motions to strike the defense of legislative immunity and will deny defendants' motions to dismiss as to this ground.

Defendants have also pled the defense of qualified immunity. Officials acting as executives are entitled to consideration of this defense under the standards stated in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). *Scott,* 716 F.2d at 1423. *Harlow* sets forth an objective test under which officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818, 102 St. Ct. at ___ , 73 L.Ed2d at ___ .

Defendants in the present case assert that the Town Council acted in good faith in denying plaintiffs' request. The complaints allege bad faith on the part of the defendants, however, and material submitted by the plaintiff provide some support for these allegations. Therefore, a genuine issue of material fact remains as to defendants' good faith. Moreover, the test of *Harlow* is an *objective* one; it focuses on the "reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow,* 457 U.S. at 818, 102 S.Ct. at __ , 73 L.Ed.2d at ___ . The court finds that the present record provides an inadequate basis for making such a determination. The court therefore will deny defendants' motions at this time. Plaintiffs' motions to strike the affirmative defense of qualified immunity will also be denied.

Finally, defendants argue that the Supreme Court has held that municipalities cannot be sued for punitive damages under § 1983. *City of Newport v. Facts Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). This argument is well taken, and the court will grant the motions to dismiss the claims for punitive damages against the Town of Front Royal.

Standing

Defendants' objection to standing was based on omissions from the original complaints of allegations that plaintiffs' property is located in the annexed area. Plaintiffs' § 1983 suit does not rest solely on the orders of the annexation court, however, and in any case, the omission has been cured in the amended complaints. The court finds that the plaintiffs have standing to bring this action, and the court will grant the motion to strike the affirmative defense of lack of standing.

Estoppel

Defendants have raised the defense of *res judicata,* arguing that plaintiffs' claims are barred by the order issued on December 13, 1984, by the annexation court denying the plaintiffs' prayer for an injunction. That order, however, merely sets forth the court's decision that the Town's revised plan of May, 1984, for the sewage extension to Happy Creek substantially complied with the annexation order of October 20, 1978. Moreover, the court explicitly based its decision in part upon "representations by the Town's attorney that the Town will comply with the ordinances." The record of the hearing indicates that the court interpreted the attorney's representations to mean that service would be provided. Thus, although the annexation court ruled that the Town's plan substantially complied with its original order, there remains a question as to whether the Town remained in compliance by implementing the plan.

Moreover, the present action involves more than the defendants' compliance with the orders of the annexation court. Plaintiffs allege that in refusing them sewer service, the defendants have denied them equal protection of the law and deprived them of property without due process of law or just compensation. These issues were not decided by the annexation court, which is a court of limited jurisdiction. Accordingly, this court will grant plaintiffs' motion to strike the defense of *res judicata* and will deny defendants' motion to dismiss on the grounds of collateral estoppel.

Liability of the Mayor and Town Manager

Defendants have moved the court to dismiss the complaints against Mayor John Marlowe and Town Manager Brackenridge Bentley for failure to state a claim against them. Defendants argue that because Marlowe and Bentley could not vote on plaintiffs' request, they are not liable for the Town Council's refusal to provide service. The lack of a vote is not determinative of liability, however; even private persons may be liable under § 1983 if they willfully participate in joint action with state officials acting under the color of state law. *Scott,* 716 F.2d at 1422. Plaintiffs here have alleged that even though Marlowe and Bentley had no vote on the matter, they played a role in the denial of sewer services to the plaintiffs. Based on the supporting materials submitted by the parties, the court finds that a genuine issue of material fact remains as to Marlowe and

Bentley's involvement. Accordingly, the court will deny the motions to dismiss them. The court will deny plaintiffs' motions to strike the affirmative defense raised on behalf of Marlowe and Bentley.

Equal Protection

Defendants have moved the court to dismiss plaintiffs' equal protection claim for failure to state a claim on which relief can be granted. The United States Supreme Court has long held that in applying the equal protection clause, courts should give broad deference to local decisions concerning land use. *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed.2d 27 (1954). *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). This rule reflects the general equal protection doctrine concerning economic regulations. In *New Orleans v Dukes,* 427 U.S. 297, 303-04, 96 S.Ct. 2513, ___ 49 L.Ed.2d 511 ___, (1976), the Supreme Court stated:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. . .
>
> [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Although the equal protection clause places a very light burden on those who defend an economic regulation, the burden does exist. In the present case, the plaintiffs have alleged invidious discrimination, claiming that the Town denied them sewer services at the same time that it provided such services to a competing industrial park development in which the Town itself has an interest. In the face of this allegation, the defendants' simple denial does not meet the burden imposed upon them under equal protection analysis. On the present state of the record, therefore, the court will deny defendants' motions to dismiss.

Due Process and State Remedies

Defendants argue that plaintiffs have no due process claim because adequate state remedies exist which provide due process. In support of this argument, defendants cite *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), *rev'd on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662, (1986). Defendants' reliance on these cases is seriously misplaced, however. The holding of these cases is that a due process claim does not arise when a government official's *negligent* act causes unintended loss of or injury to life, liberty, or property. Deliberate decisions to deprive a person of life, liberty or property are subject to the due process clause of the Fourteenth Amendment; indeed, the due process clause was "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels,* 474 U.S. at 331, citing *Hurtado v. California,* 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely,* 4 Wheat. 235, 244 (1819)).

The deprivation alleged by plaintiffs here was caused not by negligence, but by deliberate decisions of the Town Council. Plaintiffs have stated a claim under the due process clause, and § 1983 remains available to vindicate their due process rights. Accordingly, the court will deny defendants' motions to dismiss as to this ground. The court will also grant plaintiffs' motions to strike the affirmative defense of failure to exhaust state remedies. No such requirement applies to this action.

Inverse Condemnation

Defendants have moved the court to dismiss plaintiffs' inverse condemnation claim on the grounds that no taking has occurred within the meaning of the Fifth Amendment. Paragraph sixteen of the complaint in Civil Action 87-0019 states that "the refusal of the Defendants to provide sewer service denies the Plaintiff of the economically viable and all reasonable use of its land." Similarly, paragraph seventeen of the complaint in Civil Action 87-0020 alleges that "the policies and actions of the Defendants, individually and in combination, have prevented the Plaintiffs from making any economically viable or reasonable use of their land." The present record contains no evidence challenging these allegations, nor have the defendants presented the court with any authority that holds that as a matter of law, denial of sewer service may not constitute a taking. For the purposes of defendants' motions to dismiss, therefore, the court must treat the cited allegations as true, and doing so, the court finds that plaintiffs have made out a claim of inverse condemnation. Accordingly, the court will deny defendants' motions to dismiss as to this ground. The court will deny plaintiffs' motion to strike the related defense, however.

An appropriate Order shall this day issue.

ENTERED: ________________
Judge

February 22, 1988

Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1875

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION, a Virginia Corporation; FRED W. MCLAUGHLIN; GLADYS L. MCLAUGHLIN

Plaintiffs-Appellees

v.

TOWN OF FRONT ROYAL, VIRGINIA, VIRGINIA, a municipal corporation; JOHN MARLOW, individually and as Mayor of the Town of Front Royal; MICHAEL KITTS, individually and as a member of the Town Council of the Town of Front Royal, Virginia; EDWIN L. POMEROY, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; ALBERT G. RUFF, JR., individually and as a former member of the Town Council of the Town of Front Royal, Virginia; GEORGE E. BANKS, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; BRACKENRIDGE H. BENTLEY, individually and as Town Manager of the Town of Front Royal, Virginia

Defendants-Appellants

No. 90-1884

VIRGINIA ASSOCIATION OF COUNTIES; LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INCORPORATED

Amici Curiae

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION, a Virginia Corporation; FRED W. MCLAUGHLIN; GLADYS L. MCLAUGHLIN

Plaintiffs-Appellants

v.

TOWN FRONT ROYAL, VIRGINIA, a municipal corporation; JOHN MARLOW, individually and as Mayor of the Town of Front Royal; MICHAEL KITTS, individually and as a member of the Town Council of the Town of Front Royal, Virginia; EDWIN L. POMEROY, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; ALBERT G. RUFF, JR., individually and as a former member of Town Council of the Town of Front Royal, Virginia; GEORGE E. BANKS, individually and as a former member of the Town Council of the Town of Front Royal, Virginia; BRACKENRIDGE H. BENTLEY, individually and as Town Manager of the Town of Front Royal, Virginia

Defendants-Appellees

VIRGINIA ASSOCIATION OF COUNTIES; LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INCORPORATED

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellee/cross-appellant has filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin, with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court,

JOHN M. GREACEN
CLERK

IN THE CIRCUIT COURT OF WARREN COUNTY

TOWN OF FRONT ROYAL
v.

COUNTY OF WARREN

DECREE OF ANNEXATION

This proceeding, instituted on motion of the Town of Front Royal for the annexation of certain territory situate in Warren County by virtue of an annexation ordinance adopted on December 22, 1973, seeking to annex the territory described therein, this day came on again to be heard upon said ordinance and notice thereof, upon the pretrial orders entered herein, upon the stipulations entered into by and between the Town of Front Royal and the County of Warren, upon the motion of Curtis E. Thompson et als to intervene herein filed on April 19, 1976, upon the like motion of Cleveland Chair Company et als, filed on June 15, 1976, upon the evidence and exhibits heretofore taken and filed, and upon the arguments of counsel.

And the Court, being now fully advised in the premises and having matured its judgment and having reached a unanimous decision in accordance with the stipulations entered into by and between the parties hereto, as reflected by the opinion of this Court set forth in writing and filed in the Clerk's office herereof doth ADJUDGE, ORDER and DECREE as follows:

1. Jurisdiction

(a) The Annexation Court, consisting of Judge M. M. Long, Jr. of the Thirtieth Judicial Circuit, Judge W. Carrington Thompson of the Twenty-second Judicial Circuit, and the Resident Judge Joshua L. Robinson of the Twenty-Sixth Judicial Circuit, was duly constituted and convened as provided by law;

(b) The Town of Front Royal has duly adopted and filed in the manner required by law, an annexation ordinance, and said ordinance and the map attached thereto comply in form and content with the requirements of the statutes of this State in such cases made and provided, and a copy of the notice and ordinance have been duly served on each member of the governing body of Warren County, upon the Commonwealth Attorney for said County as required by law, and such notice and ordinance have been published as required by law;

(c) The Town of Front Royal has substantially complied with the conditions of the last preceding annexation in which the final order was entered more than five years prior to the institution of this proceeding;

(d) All proper jurisdictional steps have been taken to bring this proceeding properly before this Court.

1(a) Intervening Petitions

It appearing to the Court that the said petitions to intervene therein were not timely filed and should not be granted for the reasons set forth by the Court in the transcript of the hearing on July 9, 1976, said petitions to intervene were thereby denied, to which action of the Court counsel for intervenors duly except.

2. Necessity and Expediency

The Court is satisfied and hereby determines that the annexation herein decreed is both necessary and expedient, considering the best interests of the County of Warren and the Town of Front Royal, the best interests, services to be rendered and needs of the area herein decreed to be annexed, and the best interests of the remaining portions of Warren County.

3. Territory Annexed

The territory which should be and is hereby decreed to be annexed to the Town of Front Royal contains 4.23 square miles, all of which is situate in the County of Warren, and which territory contains a population of 960 persons. The area decreed to be annexed is described by metes and bounds as follows:

Metes and Bounds descriptions of the annexed areas of the Town of Front Royal, Virginia

Northwest Parcel

"BEGINNING at a point having Virginia coordinates North 462,992.05 and East 2,081,524.89, in the old corporate limit line in the centerline of the Shenandoah River, South Fork at the intersection of Punches Run; thence with the centerline of Punches Run and the new annexation line the following twelve courses: N 46-11-20 W 469.85 feet; N 30-10-33 E 133.46 feet; N 81-36-27 W 232.00 feet; N 61-44-53 W 95.41 feet; N 19-19-42 W 672.65 feet; N 71-01-30 W 120.04 feet; N 42-14-19 W 203.00 feet; N 79-47-20 W 114.88 feet; N 29-43-53 W·268.12 feet; N 71-30-40 W 174.93 feet; N 52-43-24 W 557.69 feet; N 46-56-32 W 334.80 feet to a point in the west line of the Potomic Edison Power Line easement; thence with the west line of said easement the following five courses: N 40-59-43 E 1130.11 feet; S 49-00-17 E 25.00 feet; N 40-59-43 E 1243.68 feet; N 32-14-08 E 881.31 feet; N 28-59-19 E 6.10 feet to a point in the southerly line of Forest Hills Subdivision; thence with the lines of Forest Hills Subdivision the following three courses: N 71-06-40 W 102.84 feet to a point; N 28-18-20 E 895.48 feet; S 70-02-47 E 121.71 feet to a point in the west line of the Potomic Edison Power Line easement and on the southerly side of the Southern Railroad right-of-way; thence with the west line of said Power easement and crossing the Railroad; N 32-22-03 E 210.44

feet to a point in the centerline of the Shenandoah River North fork; thence with the centerline of the said river, the following six courses: S 72-31-51 E 1541.22 feet; S 65-12-06 E 3640.71 feet; S 60-46-51 E 338.01 feet; S 47-30-23 E 1051.06 feet; S 54-53-17 E 391.18 feet; S 74-06-25 E 748.62 feet to the centerline intersection of the Shenandoah River South Fork and the centerline of Happy Creek; thence with the old corporate limit line and the centerline of the Shenandoah River South Fork, upstream to the beginning." Containing 606. acres more or less.

Easterly and Southerly Parcel

"BEGINNING at a point having Virginia coordinates North 451,620.40 and East 2,088,064.96, in the old corporate limit line on the south side of Criser Road corner to the Shenandoah National park and N 11-00-39 E 20.11 feet from a concrete monument; thence with the old corporate limit line to a point in Happy Creek where said line intersects the new line opposite the Donaldson Estate fence; thence with a new line and the Donaldson Estate fence (through the major angle points) the following six courses, S 76-46-36 E 964.76 feet; S 6-25-01 E 340.07 feet; E 3-46-09 W 247 feet; S 82-24-48 E 3239.34 feet to an iron rod, said rod being S 15-44-36.5 W 4173.90 feet from a U.S.C.& G. station designated "Happy" bearing Virginia Grid coordinates North 465,498.15 and East 2,094,444.50; continuing with the Donaldson Estate fence S 6-06-45 W 755.74 feet; S 9-45-11 E 1147.55 feet to an iron rod on the Northerly side of the Southern Railroad Right-of-way; thence with the Northern side of said Right-of-way the following four courses: N 75-25-42 E 2148.03 feet; thence along an arc bearing to the right, having a radius of 1484.65 feet a distance of 1279.65 feet; S 57-31-33 E 401.70 feet; thence along an arc, bearing to the left having a radius of 1887.00 feet, a distance of 1877.97 feet to a pin set in concrete on the Easterly side of Route 606; thence with the easterly side of Route 606 the following two courses N 3-59-05 W 72.95 feet to a pin set; N 11-52-28

W 237.05 feet to a pin set; thence Route 606 in an easterly direction, N 62-24-58 E 200.00 feet to a pin set; thence in a southerly direction S 11-52-28 E 236.45 feet to a pin set; thence S 1-59-05 W 756 feet to a pin set on the Northerly side of the Southern Railroad Right-of-way; thence S 2-46-20 W 7129.02 feet to a pin set in the centerline of pavement of Route 55; thence leaving Route 55 and with the Easterly line of a Right-of-way from Route 55 to the line of the United States Government the following four courses: S 26-19-32 W 246.09 feet thence along an arc bearing to the left, having a radius of 303.39 feet, a distance of 168.91 feet to a point of reverse curve; thence along an arc bearing to the right having a radius of 595.90 feet a distance of 153.75 feet; S 9-12-32 W 115.35 feet to a point in the line of the United States Government; thence with said Government line the following twenty-two courses: N 58-53-08 W 69.82 feet to a Monument # 107; S 20-16-02 W 233.47 feet to a mon. # 108; N 80-21-51 W 1461.25 feet to Mon. # 109; S 39-04-17 W 850.76 feet to Mon. # 110; S 19-18-35 W 3012.75 Feet to Mon. # 111; S 38-01-23 W 322.50 feet to Mon. #112; N 37-30-29 W 662.26 feet to Mon. # 113; N 58-40-40 W 927.56 feet to Mon. # 114; S 87-51-47 W 303.59 feet to Mon. # 115; N 49-34-44 W 1250.30 feet to Mon. # 116; N 85-55-43 W 1145.53 feet to Mon. # 117; S 27-08-15 W 680.80 feet to Mon. # 118; S 24-43-12 W and crossing Route 522, 1627.54 feet to Mon. #1; S 55-36-08 E 78.25 feet to Mon. #2; S 16-12-16 E 252.62 feet to Mon. # 3; S 21-08-57 E 126.45 feet to Mon. #4; S 37-14-16 E 357.08 feet to a point; S 6-05-30 E 379.73 feet to Mon. #6; S 56-36-56 W 237.56 feet to Mon. #7; S 38-15-33 W 476.80 feet to Mon. #8; S 42-53-51 W 295.93 feet to a point; S 44-54-40 W 66.00 feet to Mon. #10, Park designation "W-36", corner to the Shenandoah National Park; thence with Park line the following sixteen courses: N 76-35-20 W 2185.87 feet to a rock pile; N 33-32-01 E 132.00 feet; N 15-32-01 E 198.00 feet; N 26-32-01 E 198.00 feet;

N 19-32-01 E 396.00 feet; N 10-32-01 E 118.80 feet; N 17-32-01 E 198.00 feet; N 7-47-01 E 462.00 Feet; N 8-57-58 W 198.00 feet; N 36-40-27 W 220.84 feet to a rock pile; N 49-39-31 W 365.95 feet; N 29-23-37 W 257.40 feet; N 42-38-37 W 429.00 feet; N 35-38-37 W 198.00 feet; N 15-21-23 E 118.80 feet to a rock pile; N 11-00-39 E 1902.11 feet and passing through a concrete monument to the beginning." Containing 1818. acres more or less.

4. Reasonably Compact Body of Land

The area described in paragraph 3 above when taken together with the present Town of Front Royal forms a reasonably compact body of land and such area is adapted to town improvements and will be needed in the reasonably near future for development.

5. Terms and Conditions of Annexation

(a) *Public Debt, Schools:* The Town of Front Royal shall assume no public debt of the County of Warren in this proceeding, none of the assessed values of the County being removed thereby, nor is any feature of the operation of the schools of the County of Warren affected by virtue of this decree.

(b) *Loss of Revenue:* The Town of Front Royal shall annually, for a period of five years, beginning with year 1977, pay to the County of Warren, as loss of sales tax funds, the sum of Twenty-four Thousand Twenty Dollars ($24,020.00), and also for a period of five years, beginning with the year 1977, the Town shall reimburse the County annually the sum of Forty-two Hundred Seventy Dollars ($4270.00), for the loss of ABC funds. Said payments shall be paid on July 1 of each of the five years.

(c) *Capital Outlay and Provision of Services:*

(1) *Water Facilities:* The Town of Front Royal shall proceed with the construction of water supply mains and distribution lines in the areas herein ordered to be annexed

as shown for such areas on Town Exhibit 11; the mains as shown on said Exhibit for the annexation area hereby decreed shall be installed as soon as they become reasonably necessary and it becomes economically feasible so to do to serve the residents of the annexation area, but said improvements shall in any event be completed within five years from the effective date of annexation.

(2) *Sewer Facilities:* The Town of Front Royal shall proceed to construct interceptor and collector sanitary sewer lines in the areas herein decreed to be annexed as shown for such areas on Town Exhibit 13; the lines as shown on said Exhibit for the annexation area hereby decreed shall be installed as soon as they become reasonably necessary and it becomes economically feasible so to do to serve the residents of the annexation area, but said improvements shall in any event be completed within five years from the effective date of annexation.

(3) *Extension of Other Municipal Services:* The Town of Front Royal shall, upon the effective date of annexation, extend to the area decreed to be annexed the same police protection, fire protection, planning and zoning, garbage collection and other general governmental services, in the same manner and to the same extent as they are now or may in the future be furnished to the residents of the existing Town.

(4) *If the Town of Front Royal Becomes a City Within Five Years:* In the even that the Town of Front Royal, through the action of its council, becomes a city within five years from the effective date of this decree, this Court shall be reconvened to require such city to make such payments as are provided for in Paragraph C of Section 15.1-1042 of the 1950 Code of Virginia, as amended, for a period not to exceed five years from the date that said Town becomes a city.

6. Map to be Recorded

The map of the area decreed to be annexed as filed herewith and hereby made a part of this decree shall be recorded in the Clerk's office of the Circuit Court of Warren County.

7. Payment of Costs

The Town of Front Royal shall pay the costs of this proceeding, including the per diem and expenses of the court reporter.

8. Opinion

The opinion of this Court shall constitute the written opinion of the Court required by law, and such opinion is hereby made a part of the record in this proceeding. The opinion is set forth in the transcript of the hearing of July 9, 1976.

9. Effective Date of Annexation

The annexation hereby decreed shall become effective at midnight on December 31, 1976. After such effective date the territory hereby decreed to be annexed shall be governed, managed and controlled under and pursuant to the terms and provisions of the charter of the Town of Front Royal as amended, and shall in every respect be a part of the Town and so governed.

10. Adjournment

It is decreed that this Court be adjourned, but not dissolved, subject to being reconvened in the manner provided by law at any time during a period of five years from the effective date of this decree.

____

Judge, Thirtieth Judicial Circuit

____

Judge, Twenty-Second Judicial Circuit

____

Judge, Twenty-Sixth Judicial Circuit

VIRGINIA, IN THE CIRCUIT COURT OF WARREN COUNTY:

FRONT ROYAL AND WARRREN COUNTY INDUSTRIAL PART CORPORATION, et als

v.

TOWN OF FRONT ROYAL

and

COUNTY OF WARREN

DECREE OF ANNEXATION

This proceeding, instituted on the petition of more than 51 per centum of the qualified voters of the territory, sought to be annexed and others, this day came on again to be heard upon said petition for annexation and notice thereof; upon the pretrial orders entered herein; upon motion of R. Alton Morrison in open court that he be permitted to intervene herein, said motion was granted, and he was made a party to this suit; upon the evidence and exhibits heretofore taken and filed, upon the full and complete view by the Court of the areas proposed to be annexed and territories adjacent thereto and upon the arguments of counsel.

And the Court, being now fully advised in the premises and having matured its judgment and having reached a unanimous decision in accordance with the evidence and the argument of counsel, as reflected by the opinion of this Court set forth in writing and filed in the Clerk's Office hereof which is hereby made a part of the record herein, doth ADJUDGE, ORDER, and DECREE as follows:

1. Jurisdiction

(a) The Annexation Court, consisting of Judge John A. Jamison of the Fifteenth Judicial Circuit, Judge Rober C. Goad of the Twenty-Fourth Judicial Circuit, and Judge Duncan C. Gibb of the Twenty-Sixth Judicial Circuit, the

Resident and Presiding Judge, was duly constituted and convened as provided by law.

(b) That the petition for annexation together with the map attached thereto comply in form and content with the requirements of the statutes of this State in such cases made and provided, and a copy of said petition has been duly served on the governing body of the Town of Front Royal and its Town Attorney and a like copy having been served upon each member of the governing body of the County of Warren and its Commonwealth Attorney as required by law, and such petition and map have been published as required by law.

(c) All proper jurisdictional steps have been taken to bring this proceeding properly before this court.

2. Necessity and Expediency

The Court is satisfied and hereby determines that the annexation herein decreed is both necessary and expedient, considering the best interests of the County of Warren and the Town of Front Royal, the best interests, services to be rendered and needs of the area herein decreed to be annexed, and the best interests of the remaining portions of Warren County.

3. Territory Annexed

The territory which should be and is hereby decreed to be annexed to the Town of Front Royal contains 595.8 acres, all of which is situated in the County of Warren, which territory contains a population of 31 persons. The area decreed to be annexed is described by metes and bounds as follows, according to a survey made by William Hall, Certified Land Surveyor, on September 11, 1978, to-wit:

"BEGINNING at an iron pin found at a corner of the Donaldson estate, said point being a corner of the recently annexed area of the Town of Front Royal as described by Joseph G. Grogan, Land Surveyor; thence leaving the existing town boundary North 41° 51' 04" East, 3625.09 feet running through the property of Morrison to an iron pin set by a fence post, a corner of the Duncan property; thence South 75° 33' 21" East, 3587.39 feet running with the average line of the fence between the Morrison and the Duncan properties and crossing State Road Route 606 to an iron pin set in the easterly line of Route 606 and in the line of the Atwood property; thence South 18° 27' 26" West, 371.70 feet running with the easterly line of Route 606 to an iron pin set by a fence post, a corner of Atwood; thence leaving Route 606 South 79° 10' 49" East, 2204.13 feet running with the line of Atwood to an iron pin set at a fence corner; thence South 11° 26' 49" East, 1025.66 feet to an iron pin set in the northerly line of the Southern Railroad; thence leaving the Atwood property South 49° 00' 47" East, 114.52 feet crossing the Southern Railroad and crossing State Road Route 647 to an iron pin set in the southerly line of Route 647 a corner of the Baltimore and Robinson properties; thence running with the southerly line of Route 647 the average courses and distances of which are South 61° 05' 55" West, 87.15 feet to a point of curvature; thence along a curve to the left having a radius of 2192.77 feet, an arc length of 297.51 feet, and a chord bearing and distance of South 57° 12' 43" West, 297.28 feet to a point of tangency; thence South 53° 19' 30" West, 2424.04 feet to a point of curvature; thence along a curve to the right having a radius of 1898.65 feet, an arc length of 201.41 feet, and a chord bearing and distance of South 56° 21' 50" West, 201.31 feet to a point of tangency; thence South 59° 24' 10" West, 143.14 feet to an iron pin set where the southerly line of Route 647 intersects the existing town boundary, said point bearing South 02° 46' 2" West, 102.19 feet from an iron pin found at a corner of the recently annexed area of the Town of Front Royal, said reference pin being in the northerly line of the Southern Railroad; thence leaving the southerly line of Route 647 and running with the existing town boundary to the point of beginning, containing 595.8 acres of land, more or less."

4. Reasonably Compact Body of Land

The area described in paragraph 3 above, when taken together with the present Town of Front Royal forms a reasonably compact body of land and such area is adapted to town improvements and will be needed in the reasonably near future for development and especially is said land suitable for industrial development, which the Court doth so adjudicate.

5. Terms and Conditions of Annexation

(a) *Public Debt, School, Loss of Revenue:* The Town of Front Royal shall assume no public debt of the County of Warren in this proceeding, none of the assessed values of the County being removed thereby, nor is any feature of the operation of the schools of the County of Warren affected by virtue of this decree nor is there any compensable loss of revenue due the County of Warren by virtue of the annexation herein decreed.

(b) *Capital Outlay and Provision for Services:*

(1) *Water Facilities:* It appearing to the Court that town water has already been extended to the boundaries of the annexation area, it is accordingly ordered that the town shall extend water service into said area as soon as it becomes reasonably necessary and economically feasible so to do in accordance with the then existing town policy.

(2) *Sewer Facilities:* The Town of Front Royal shall proceed to construct interceptor and collector sanitary sewer lines in the areas herein decreed to be annexed and shall construct two pumping stations therein in accordance with the testimony of engineer expert witness, Massie, one

to be located in the area annexed belonging to the original petitioners, and the other to be located on the area annexed belonging to R. Alton Morrison, as soon as they become reasonably necessary and it becomes economically feasible so to do to serve the residents of the annexed area or any industrial concerns which locate therein but said improvements including the two pumping stations referred to above shall be completed within five years from the effective date of annexation.

(3) *Extension of other Municipal Services:* The Town of Front Royal shall, upon the effective date of annexation, extend to the area decreed to be annexed the same police protection, fire protection, planning and zoning, garbage collection and other general governmental services, in the same manner and to the same extent as they are now or may in the future be furnished to the residents of the existing Town.

6. Map to be Recorded

The map of the area decreed to be annexed as filed herewith and hereby made a part of the decree shall be recorded in the Clerk's Office of the Circuit Court of Warren County in accordance with Section 15.1-1051 of the Code of Virginia.

7. Payment of Costs

After due consideration as to who should pay the costs of this proceeding and in what proportions, the Town of Front Royal shall pay 50% of the costs of the final survey, R. Alton Morrison shall pay 35% of the costs of the final survey and the other petitioners shall pay 15% of the costs of the final survey; the Town of Front Royal, County of Warren, R. Alton Morrison and the other petitioners shall each pay 25% of the expenses of the Court Reporter, including the per diem; and all other costs are to be paid by those who incurred them.

8. Opinion

The opinion of this Court shall constitute the written opinion of the Court required by law, and such opinion is hereby made a part of the record in this proceeding.

9. Effective Date of Annexation

The annexation hereby decreed shall become effective at midnight on December 31, 1978. After such effective date the territory hereby decreed to be annexed shall be governed, managed and controlled under and pursuant to the terms and provisions of the charter of the Town of Front Royal as amended, and shall in every respect be a part of the Town and so governed.

10. Adjournment

It is decreed that this Court be adjourned, but not dissolved, subject to being reconvened in the manner provided by law at any time during a period of five years from the effective date of this decree.

Judge, Fifteenth Judicial Circuit

Judge, Twenty-Fourth Judicial Circuit

Judge, Twenty-Sixth Judicial Circuit

ENTER October 20 1978

We request the entry of this Decree:

Of Counsel for Petitioners

Seen:

Counsel for Town of Front Royal

SEEN AND EXCEPTED TO:

Counsel for Warren-County

11 September 1978

Description of
Land Subject to Annexation Petition
Town of Front Royal
Warren County, Virginia

Beginning at an iron pin found at a corner of the Donaldson estate, said point being a corner of the recently annexed area of the Town of Front Royal as described by Joseph G. Brogan, Land Surveyor; thence leaving the existing town boundary

North 41°51'04" East, 3625.09 feet running through the property of Morrison to an iron pin set by a fence post, a corner of the Duncan property; thence

South 75°33'21" East, 3587.39 feet running with the average line of the fence between the Morrison and the Duncan properties and crossing State Road Route 606 to an iron pin set in the easterly line of Route 606 and in the line of the Atwood property; thence

South 18°27'26" West, 371.70 feet running with the easterly line of Route 606 to an iron pin set by a fence post, a corner of Atwood; thence leaving Route 606

South 79°10'49" East, 2204.13 feet running with the line of Atwood to an iron pin set at a fence corner; thence

South 11°26'49" East, 1025.66 feet to an iron pin set in the northerly line of the Southern Railroad; thence leaving the Atwood property

South 49°00'47" East, 114.52 feet crossing the Southern Railroad and crossing State Road Route 647 to an iron pin set in the southerly line of Route 647, a corner of the Baltimore and Robinson properties; thence running with the southerly line of Route 647 the average courses and distances of which are

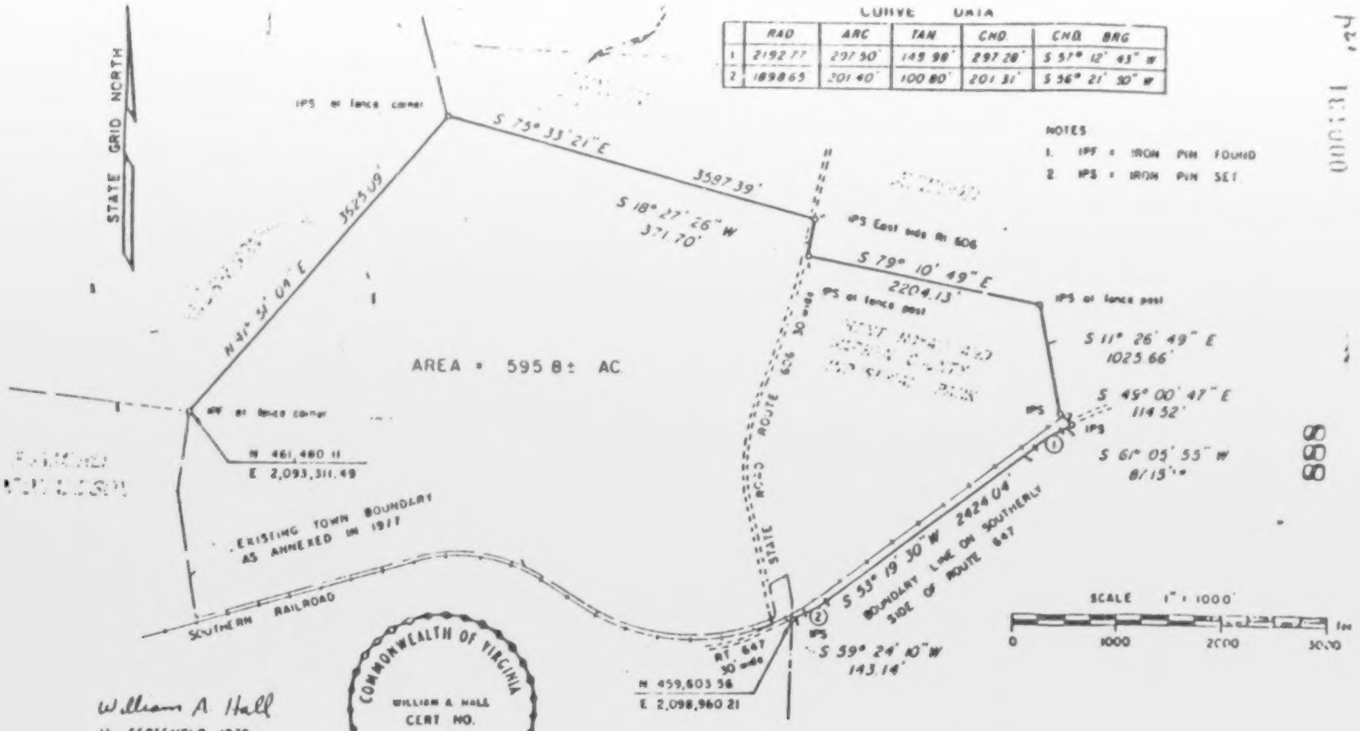
South 61°05'55" West, 87.15 feet to a point of curvature; thence along a curve to the left having a radius of 2192.77 feet, an arc length of 297.51 feet, and a chord bearing and distance of

South 57°12’43” West, 297.28 feet to a point of tangency; thence

South 53°19’30” West, 2424.04 feet to a point of curvature; thence along a curve to the right having a radius of 1898.65 feet, an arc length of 201.41 feet, and a chord bearing and distance of

South 56°21’50” West, 201.31 feet to a point of tangency; thence

South 59°24’10” West, 143.14 feet to an iron pin set where the southerly line of Route 647 intersects the existing town boundary, said point bearing South 02°46’2” West, 102.19 feet from an iron pin found at a corner of the recently annexed area of the Town of Front Royal, said reference pin being in the northerly line of the Southern Railroad; thence leaving the southerly line of Route 647 and running with the existing town boundary to the point of beginning, containing 595.8 acres of land, more or less.


STATE GRID NORTH
IPS at fence corner
S 75° 33' 21" E
3597.39'
N 41° 51' 04" E
3525.09'
S 18° 27' 26" W
371.70'
IPS East side Rt 606
S 79° 10' 49" E
2204.13'
IPS at fence post
IPS at fence post
S 11° 26' 49" E
1025.66'
IPS
S 45° 00' 47" E
114.52'
IPS
S 61° 05' 55" W
81.15'
①
S 53° 19' 30" W 2424.04'
BOUNDARY LINE ON SOUTHERLY SIDE OF ROUTE 647
②
IPS
S 59° 24' 10" W
143.14'
RT. 647
30' wide
N 459,603.56
E 2,098,960.21
STATE ROAD ROUTE 606 30' wide
AREA = 595.8± AC
IPF at fence corner
N 461,480.11
E 2,093,311.49
EXISTING TOWN BOUNDARY AS ANNEXED IN 1977
SOUTHERN RAILROAD
SCALE 1" = 1000'
0
1000
2000
3000

CURVE DATA

	RAD	ARC	TAN	CHD	CHD BRG
1	2192.77	297.50'	149.98'	297.28'	S 57° 12' 43" W
2	1898.65	201.40'	100.80'	201.31'	S 56° 21' 50" W

NOTES
1. IPF = IRON PIN FOUND
2. IPS = IRON PIN SET

William A. Hall
11 SEPTEMBER 1978

WILLIAM A. HALL
CERT NO.
1130

WILLIAM A. HALL
LAND SURVEYOR - ENGINEER
FRONT ROYAL, VIRGINIA

PLAT OF SURVEY OF
LAND SUBJECT TO ANNEXATION

TOWN OF FRONT ROYAL

WARREN COUNTY, VIRGINIA

BEST AVAILABLE COPY

ANNEXATION COURT ORDER DATED JANUARY 20, 1984

COMMON LAW ORDER BOOK 6 PAGE 489

In the Circuit Court of the County of Warren, State of Virginia, on Friday, the twentieth day of January, in the year of Our Lord, One Thousand Nine Hundred and Eighty-Four.

Present: The Honorable Wiley R. Wright, Judge Designate
The Honorable B. A. Davis, III, Judge Designate
The Honorable Norman K. Moon, Judge Designate

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION, et al.

v.

TOWN OF FRONT ROYAL and COUNTY OF WARREN

AT LAW NO. 4596

ORDER

This matter came on to be heard on the 27th day of December, 1983, before a three-judge court composed of the Honorable Wiley R. Wright, Judge of the Eighteenth Judicial Circuit, designated resident judge; Honorable B.A. Davis, III, Judge of the Twenty-Second Judicial Circuit; and the Honorable Norman K. Moon, Judge of the Twenty-Fourth Judicial Circuit, pursuant to their designation by order of the Chief Justice of the Supreme Court of Virginia, dated the 14th day of October, 1983, to hear this matter on the petition of the Front Royal and Warren County Industrial Park Corporation, et als, to require the Town of Front Royal to comply with the Annexation Order entered in this matter on the 20th day of October, 1978, and upon the response to said petition by the Town of Front Royal, and was argued by counsel.

And the Court, being fully advised of the premises, and having given due consideration to the petition filed herein and the response filed thereto by the Town of Front Royal, is of the opinion that it would be fair and reasonable to grant the Town of Front Royal an extension of two (2) years from the effective date hereof to comply with the terms and provisions of the Annexation Order of October 20, 1978, the Court doth so order.

The Court doth further order as follows:

1. The Town of Front Royal shall file a construction schedule with the Court within three (3) months from the effective date hereof with a copy thereof to counsel for the petitioners.

2. The Town of Front Royal shall make a progress report to the Court every six (6) months thereafter with a copy of said report to counsel for the said petitioners.

3. The Town of Front Royal shall begin furnishing pump and haul sewer service to any industrial or manufacturing concern as soon as such concern is located in the area annexed to the Town of Front Royal by the aforesaid order of October 20, 1978, and said sewer service shall be of the same order and in the same manner as that provided by the Town of Front Royal to the DuPont Plant prior to the installation of sewer lines and pumping stations to said plant.

4. Leave is granted the petitioners to request that this Court re-convene in the event that the Town of Front Royal neglects to or fails to comply with the foregoing provisions of this Order.

5. This order shall be effective as of December 27, 1983.

6. This Court is hereby adjourned, but not dissolved, subject to being re-convened on request of any of the

parties hereto at any time during a period of two (2) years from the effective date of this order.

ENTERED THIS 20th day of January, 1984.

/s/ Wiley H. Wright
Honorable Wiley H. Wright, Judge of the Eighteenth Judicial Circuit, designated resident judge

/s/ B. A. Davis, III
Honorable B. A. Davis, III, Judge of the Twenty-Second Judicial Circuit

/s/ Norman K. Moon
Honorable Norman K. Moon, Judge of the Twenty-Fourth Judicial Circuit

We request the entry of this Order:

/s/
Counsel for petitioners

SEEN:

/s/
Counsel for the Town of Front Royal

FIRST AMENDED COMPLAINT OF FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION (87-0019(H)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA HARRISONBURG DIVISION

Civil Action No. 87-0019 (H)

FRONT ROYAL AND WARREN COUNTY
INDUSTRIAL PARK CORPORATION,
a Virginia Corporation,
Plaintiff,

vs.

TOWN OF FRONT ROYAL, VIRGINIA, et al.,
Defendants.

FIRST AMENDED COMPLAINT

The Plaintiff files this Amended Complaint having been granted leave to do so by Order of the Court dated and filed September 17, 1987.

Jurisdiction

1. This case arises from the deprivation of the Plaintiff, Front Royal and Warren County Industrial Park Corporation, of its property and reasonable use of its property under color of state law and governmental regulations and policies of the Defendants in violation of its Constitutional rights guaranteed by Amendments V, XIV. This action is brought under 42 U.S.C. § 1983, seeking redress in compensatory damages totaling $1,600,000.00, punitive damages in the amount of $8,000,000.00 and an award of counsel fees and costs.

2. This Court has jurisdiction based on the alleged denial of the Plaintiff's rights under the Constitution of the United States of America and the request for redress under 42 U.S.C. § 1983.

II

The Parties

3. That the Plaintiff, Front Royal and Warren County Industrial Park Corporation, is a Virginia corporation and is the owner of a parcel of land within the Town of Front Royal consisting of approximately 86 acres subdivided into sixteen industrial lots as shown on the plat attached hereto and, a part hereof, as Exhibit A, hereinafter referred to as Parcel "A".

4. That the Town of Front Royal is a municipal corporation and political subdivision in the Commonwealth of Virginia.

5. That the Defendants, John Marlow, Michael Kitts, Edwin L. Pomeroy, Albert G. Ruff, Jr., and George E. Banks, are members of the Town Counsel of the Town of Front Royal, or were such at the time of the actions complained of, the governing body thereof and controls the policies, regulations and administration of the Town.

6. That the Defendant, Brackenridge H. Bentley, is the Town Manager of the Town of Front Royal, Virginia and has the responsibility for making recommendations relative to policies of the Town Council and for carrying out the administrative policies of the Council. He is the chief administrative officer of the Town of Front Royal.

III

Allegation of Facts

7. That the land of the Front Royal and Warren County Industrial Park Corporation, Parcel A, consisting of six-

teen industrial lots became part of the Town and within its jurisdiction by annexation decreed by a special three judge court effective December 31, 1978.

8. That the said order of the Special Court referred to in paragraph 7 above provided as follows:

> *Sewer Facilities:* The Town of Front Royal shall proceed to construct interceptor and collector sanitary sewer lines in the areas herein decreed to be annexed and shall construct two pumping stations therein in accordance with the testimony of engineer expert witness, Massie, one to be located in the area annexed belonging to the original petitioners, and the other to be located on the area annexed belonging to R. Alton Morrison, as soon as they become reasonably necessary and it becomes economically feasible so to do to serve the residents of the annexed area or any industrial concerns which locate therein but said improvements including the two pumping stations referred to above shall be completed within five years from the effective date of annexation.

9. That the sewer lines required to be installed by the said annexation order which became effective on December 31, 1978 have never been installed in compliance therewith. The Special Annexation Court was reconvened December 13, 1984 at Plaintiff's request to consider the failure of the Town of Front Royal to provide the sewer service required by the annexation order which became effective December 31, 1978. At the December 13, 1984 hearing the annexation court found that the Town's revised plans for the extension of sewer service to the area wherein is located Plaintiff's property, was in substantial compliance with the previous court order which became effective December 31, 1978 as to the location of the main transmission line. At the hearing on December 13, 1984, the attorney for the Town of Front Royal assured both

the court and the Plaintiff that the Town intended to act promptly to comply with the December, 1978 order and provide sewer service to those parties who made application for the said service. However, notwithstanding the statements to the court of the Town's intentions, the Town has failed to provide sewer service for the reasonable development of Plaintiff's property. Instead, the Town's revised sewer service plan discriminates against the reasonable development of Plaintiff's property and denies Plaintiff equal protection of the law.

10. That, upon coming within the jurisdiction of the Town, the officers and council thereof were obligated to provide services to the property of the Plaintiff on the same or equal basis as other property owners within the Town.

11. That upon the property of the Plaintiff being annexed to the Town, the Defendants had the duty to apply the ordinances, policies, and regulations of the Town uniformly, giving the Plaintiffs equal protection and privileges under the laws of the Town and without discriminating against the Plaintiffs.

12. That to the present the Defendants have constructed sewer lines to serve other properties in the Town not required by court order or where no greater need existed than with respect to the Plaintiff's properties.

13. That notwithstanding the fact that Plaintiff applied for sewer service to its property, pursuant to Town requirements, the Defendants have failed to comply with the court order and its duty as set forth above and as of June 10, 1986, refused to provide said sewer service in violation of the Constructional rights of the Plaintiff.

14. That the Defendants have discriminated against the Plaintiff by constructing sewer lines to serve other properties in the Town not required by court order or where no greater need existed than with respect to the Plaintiff's

property, in violation of the Plaintiff's right to equal protection of the law.

15. That subsequent to the annexation of 1978, the Town of Front Royal zoned Parcel "A" for industrial uses comparable to the zoning of the property by the County of Warren before said parcel was annexed.

16. That the development of the Plaintiff's property in industrial uses is dependent upon water and sewer service and the refusal of the Defendants to provide sewer service denies the Plaintiff of the economically viable and all reasonable use of its land.

17. That subsequent to the annexation of Parcel "A" in 1978, the Happy Creek Industrial Authority created by the Town of Front Royal and the County of Warren purchased fifty-five (55) acres of land across the road (Rt. 606) from landowner, R. Alton Morrison, to develop as an industrial park in competition with the industrial development of Plaintiff Front Royal and Warren County Industrial Park Corporation.

18. That the Defendants, as the governing body of the Town, discriminated against the Plaintiff and constructed a sewer line to the benefit of the property of the Happy Creek Industrial Authority and the land of Morrison at excessive costs, and to the detriment of and discriminating against the development of the industrial park of Plaintiff Front Royal and Warren County Industrial Park Corporation.

19. That the Defendants, as of June 10, 1986, refuse to provide sewer service to the Plaintiff's property on a reasonable or equal basis as provided to other properties in the Town or as required by Court order.

20. That the willful, wanton and arbitrary actions, policies and resolutions of the Defendants have unlawfully discriminated against the Plaintiff, have denied them equal protection of the law and the Defendants, deliberately,

have deprived the Plaintiff of its property without due process of law or just compensation, in violation of Amendments V and XIV of the Constitution of the United States of America.

21. That the Defendants have acted under color of state law, policies and resolutions of the Town of Front Royal, a political subdivision of the Commonwealth of Virginia and the Plaintiff is entitled to redress under 42 U.S.C. § 1983.

IV

Damages

22. That the Plaintiff, Front Royal and Warren County Industrial Park Corporation, by the wrongful and willful actions of the Defendants, has been damaged in the amount of $1,600,000.00 and is entitled to punitive damages in the amount of $8,000,000.00.

V

Relief Sought

Wherefore, the Plaintiff prays that it be awarded compensatory and punitive damages in the amounts claimed, together with reasonable attorney fees and its costs expended. Jury trial is demanded.

FRONT ROYAL AND WARREN COUNTY
INDUSTRIAL PARK CORPORATION

By ______________________________
Counsel

Robert C. Fitzgerald, Esq.
Myron C. Smith, Esq.
Fitzgerald and Smith, P.C.

10560 Main Street, Suite 510
Fairfax, Virginia 22030
Counsel for Plaintiff
(703) 273-0001

(*Certificate of Service* omitted)

First Amended Complaint of Fred W. McLaughlin, et ux. (87-0020(H))

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA HARRISONBURG DIVISION

Civil Action No. 87-0020(H)

FRED W. McLAUGHLIN, et ux.,
Plaintiffs,
vs.
TOWN OF FRONT ROYAL, VIRGINIA, et al.,
Defendants.

FIRST AMENDED COMPLAINT

The Plaintiffs file this Amended Complaint having been granted leave to do so by Order of the Court dated and filed September 17, 1987.

Jurisdiction

1. This case arises from the deprivation of the Plaintiffs, Fred W. McLaughlin and Gladys L. McLaughlin, his wife, of their property and reasonable use of their property under color of state law and governmental regulations and policies of the Defendants in violation of their constitutional rights guaranteed by Amendments V, XIV. This action is brought under 42 U.S.C. § 1983, seeking redress in compensatory damages totaling $2,125,000.00, punitive damages in the amount of $10,625,000.00 and an award of counsel fees and costs.

2. This Court has jurisdiction based on the alleged denial of the Plaintiffs' rights under the Constitution of the United States of America and the request for redress under 42 U.S.C. § 1983.

II

The Parties

3. The Plaintiffs, Fred W. McLaughlin, and Gladys L. McLaughlin, his wife, herein referred to as "McLaughlin," are residents of Warren County, Virginia, and the owners of a certain parcel of land located on Route No. 647 in the Town of Front Royal, Virginia consisting of approximately 55 acres of land as shown on the plat attached hereto as Exhibit A.

4. That the Town of Front Royal is a municipal corporation and political subdivision in the Commonwealth of Virginia.

5. That the Defendants, John Marlow, Michael Kitts, Edwin L. Pomeroy, Albert G. Ruff, Jr., and George E. Banks, are members of the Town Council of the Town of Front Royal, or were such at the time of the actions complained of, the governing body thereof, and control the policies, regulations and administration of the Town.

6. That the Defendant, Brackenridge H. Bentley, is the Town Manager of the Town of Front Royal, Virginia and has the responsibility for making recommendations relative to policies of the Town Council and for carrying out the administrative policies of the Council. He is the chief administrative officer of the Town of Front Royal.

III

Allegation of Facts

7. That the land of McLaughlin, became part of the Town and within its jurisdiction when it was annexed to the Town by order of a special three judge court sitting in the Circuit Court of Warren County, Virginia, said order being effective December 31, 1976.

8. That the said order of the Special Court, paragraph 5(c)(2), page 4, provided, inter alia:

> *Sewer Facilities:* The Town of Front Royal shall proceed to construct interceptor and collector sanitary sewer lines in the areas herein decreed to be annexed as shown for such areas on Town Exhibit 13, the lines as shown on said Exhibit for the annexation area hereby decreed shall be installed as soon as they become reasonably necessary and it becomes economically feasible so to do to serve the residents of the annexation area, but said improvements shall in any event be completed within five years from the effective date of annexation.

9. That the sewer lines required by the said annexation order of December 31, 1976 have never been constructed in compliance with said order.

10. That, upon coming within the jurisdiction of the Town, the officers and council thereof were obligated to provide services to the property of the Plaintiffs on the same or equal basis as other property owners within the Town.

11. That upon the property of the Plaintiffs being annexed to the Town, the Defendants had the duty to apply the ordinances, policies, and regulations of the Town uniformly, giving the Plaintiffs equal protection and privileges under the laws of the Town and without discriminating against the Plaintiffs.

12. That to the present the Defendants have refused to construct sewer lines to serve the property of the Plaintiffs, while constructing lines to serve other properties in the Town not required by court order or where no greater need existed and on a basis different than as applied to the Plaintiff's properties, discriminating against the Plaintiffs.

13. That Plaintiffs' property is zoned in a residential category which permits minimum lots of 10,000 square feet provided public water and sewer service is provided.

14. That McLaughlin has requested the Defendants to provide the sewer lines and service but, as of June 10, 1986, the Defendants have refused for the reason that the property is not subdivided or developed into small lots requiring sewer service and there are no users at present.

15. That McLaughlin has applied previously for approval of the subdivision of said property, in accordance with the zoning ordinance, into smaller lots but has been denied by the Defendants for the reason that sewers have not been provided.

16. That the subdivision of the Plaintiffs' land, in minimum lots of ten thousand (10,000) square feet with public water and sewer is the only economically viable use of the land.

17. That the Defendants still refuse to provide sewer service to the Plaintiffs' property on a reasonable or equal basis as provided to other properties similarly situated or as required by Court order, refuse to permit the subidivision of Plaintiffs' property, and the policies and actions of the Defendants, individually and in combination, have prevented the Plaintiffs from making any economically viable or reasonable use of their land.

18. That the willful, wanton and arbitrary actions, policies and resolutions of the Defendants have unlawfully discriminated against the Plaintiffs, have denied them equal protection of the law, and the Defendants, deliberately, have deprived the Plaintiffs of their property without due process of law or just compensation, in violation of amendments V and XIV of the Constitution of the United States of America.

19. That the Defendants have acted under color of state law, policies and resolutions of the town of Front Royal,

a political subdivision of the Commonwealth of Virginia and the Plaintiffs are entitled to redress under 42 U.S.C. § 1983.

IV

Damages

20. That the Plaintiffs, Fred W. McLaughlin and Gladys L. McLaughlin, by the wrongful and willful actions of the Defendants have been damaged in the amount of $2,125,000.00 and are entitled to punitive damages in the amount of $10,625,000.00

V

Relief Sought

Wherefore, the Plaintiffs pray that they be awarded compensatory and punitive damages in the amounts claimed, together with reasonable attorney fees and their costs expended. Jury trial is demanded.

FRED W. McLAUGHLIN
GLADYS L. McLAUGHLIN

Bu ______________________
Counsel

Robert C. Fitzgerald, Esq.
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OPPOSITION

BRIEF

(3)

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In The

Supreme Court of the United States

October Term, 1991

FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION, FRED W. McLAUGHLIN and GLADYS L. McLAUGHLIN,

Petitioners,

vs.

TOWN OF FRONT ROYAL, VIRGINIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners,

vs.

TOWN OF FRONT ROYAL, VIRGINIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Virginia law provides a specialized statutory framework through which cities and towns may grow by annexing land from surrounding counties. Va. Code § 15.1-1032 *et seq.* The statutory framework provides for the creation of specialized annexation courts to determine whether a city or town may annex adjacent land, and the terms and conditions for any annexation. Va. Code § 15.1-1042. Each annexation court consists of three circuit court judges appointed by the Virginia Supreme Court. Va. Code § 15.1-1038. If annexation is permitted, the annexation court remains in existence for ten years, and during that period, the court has the "power and it shall be its duty . . . to enforce the terms and conditions under which annexation was granted." Va. Code § 15.1-1047. Any action taken by an annexation court is subject to direct review by the Virginia Supreme Court. *Id.*

In 1976 and 1978, the petitioners' properties were the subject of the annexation process and they became part of the Town of Front Royal. The 1976 annexation of the property owned by the McLaughlins was initiated by the Town, but the 1978 annexation was initiated by the Industrial Park Corporation. In 1984, the Industrial Park Corporation believed that the Town had failed to comply with the 1978 Annexation Court order with respect to the provision of sewer service, and at its request, the Annexation Court reconvened to consider this issue. The Town presented its revised plans for the provision of sewer service, and the Annexation Court ruled that those plans were in substantial compliance with its earlier order. (App. 97a). The Annexation Court granted the Town a two-year extension of time in which to implement its plan and its order specifically provided as follows:

> Leave is granted the petitioners [Industrial Park Corporation, et als] to request that this Court reconvene in the event that the Town of Front Royal neglects or fails to comply with the foregoing provisions of this Order.

(App. 97a). The Industrial Park Corporation made no subsequent request that the Annexation Court reconvene.

The McLaughlins never asked the Annexation Court to reconvene for any purpose, even to seek the enforcement of its order. In fact, it was not until 1985, almost nine years after entry of the 1976 Annexation Court order that the McLaughlins even "filed a formal application requesting the Town to extend [sewer] service to their property." (Pet. 9). None of the petitioners ever brought an action in state court seeking either to compel the Town's compliance with the orders, or compensation for any failure to provide the sewer services to which they believed they were entitled.[1] Rather, in 1987, they brought this action in federal court charging that the failure to provide the sewer service required by the Annexation Court orders constituted a violation of their rights guaranteed by the fourteenth amendment.

Following district court proceedings, the court of appeals decided that this was an appropriate case for it to exercise its discretionary power to abstain. In asserting that the court of appeals erred, petitioners argue that it had no discretion to exercise in favor of abstention because there were no remaining issues of state law to be settled.[2] (Pet. 27 n.24). Petitioners point to the initial interlocutory appeal in which the circuit court restricted its inquiry to the issue of absolute legislative immunity. (App. 6a) (*citing Abney v. United States*, 431 U.S. 651, 662-63 (1977) (interlocutory review limited to claim of absolute immunity)). Petitioners suggest that in its interlocutory review, the court of appeals held that the town officials enjoyed no discretion in complying with the Annexation Court orders, and thus that the remaining questions of state law had already been answered. The circuit court found no such thing; rather, in deciding whether or not absolute immunity attached, it only determined that the defendants were not exercising *legislative* discretion in applying the Annexation Court's orders. (App. 16a). The court of appeals did not, as the petitioners would have it, determine that the town officials violated those orders — only that they did not act in a legislative capacity in construing and carrying our their terms. (App. 15a). In fact, in its subsequent decision to abstain, the court of appeals expressly held that issues of state law do remain.[3] The court observed that "[a]t the heart of the case before us is the question whether Front Royal ever complied with the orders of the Annexation Courts." (App. 10a).

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[1] The court of appeals noted multiple state remedies which the petitioners bypassed in favor of seeking to have a federal court enforce these state court orders. The court of appeals observed that writs of "mandamus and prohibition shall lie from the Supreme Court of Appeals or any circuit court to compel a city or town to carry out the provisions of [the annexation statute] or to forbid any violation of the same." (App. 9a) (*quoting* Va. Code § 15.1-1048). In addition, "the Virginia Constitution provides due process protection to those who have been unlawfully deprived of their property. Va. Const. Art. I § II. Virginia courts have consistently recognized a common law cause of action to protect this right. *See Groves v. Cox*, 559 F. Supp. 772, 777 (E.D. Va. 1983); *Morris v. Elizabeth River Tunnel District*, 203 Va. 196, 198, 123 S.E.2d 398, 400 (1962)." (App. 10a-11a).

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[2] Petitioners assert that this case involves neither a challenge to the constitutionality of the annexation process nor to the decision of the Annexation Courts, and that the sole issue is whether the Town violated their federal rights. (Pet. 13 n.9). That characterization is not accurate. Petitioners are claiming only that they have been wrongfully denied sewer service, to which they were entitled pursuant to the Annexation Court orders as authorized by Virginia statutory enactments. In *Snowden v. Hughes*, 321 U.S. 1, 11 (1944), this Court held that the "[m]ere violation of a state statute does not infringe the federal constitution . . . [a]nd state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature." Unequal application of state laws does not, without more, violate any federal right.

[3] For example, one of the principal disputes relating to the property owned by the Industrial Park Corporation was whether the Annexation Court orders required the Town to construct interceptor lines to each of its subdivided parcels, or whether construction of a trunk line and a pump station on the property in a location that would allow each of the parcels to be sewered by their own gravity lines, complied with the order.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT COURT OF APPEALS HAS NOT ADOPTED A *PER SE* RULE OF ABSTENTION IN LAND USE CASES.

The basic premise of the petitioners' challenge to the decision of the court of appeals is their contention that the Fourth Circuit has adopted a "doctrine of *per se* abstention in federal cases arising in the context of local or state 'land use' regulations." (Pet. 25). That premise is erroneous, and it is upon that central flaw that each of the petitioners' challenges should fail. Petitioners charge that because the Fourth Circuit has adopted a *per se* abstention rule, its decision is contrary to the decisions of this Court, and that the circuit courts are in conflict with respect to abstention in "land use" cases. The criticism of the court of appeals' decision and the petitioners' perception that a split in the circuits exists is grounded upon a misreading of the opinion of the court of appeals, and upon a misunderstanding of the law.

Nowhere in its decision can the court of appeals be charged with adopting or adhering to a *per se* rule of abstention to be applied in all "land use" cases. Instead, the reasons for abstention articulated by the court of appeals were that it was being asked to interpret and enforce the orders of Virginia's statutorily constituted annexation courts. (App. 8a). The court of appeals recognized that it was being "asked to determine that [the Town] violated the orders of the Annexation Courts," and that "[a]ll of plaintiffs' claims stem from their assertion that [the Town] violated the Annexation Court's orders." (App. 8a). After noting that "the annexation system as set up in Virginia is a complex scheme," the court of appeals observed that "[t]he courts of Virginia have much greater familiarity with the operation of the Virginia annexation scheme, and . . . they should have the first opportunity to pass upon them." (App. 10a).

The petitioners argue that when the present decision is read in conjunction with three other decisions, the Fourth Circuit's adherence to a *per se* rule of abstention in "land use" cases becomes apparent. (Pet. 23-24).[4] To invite such a conclusion asks this Court to accept those cases as the totality of the Fourth Circuit's discussions of abstention in the "land use" context, and it completely ignores the unique characteristics which distinguish this case. It is wholly inaccurate even to suggest that the Fourth Circuit has reached the same result or has rigidly applied a rule of abstention each time it has been asked to abstain in cases that involve "land use" issues. *See Donohoe Construction Co. Inc. v. Montgomery County Council,* 567 F.2d 603 (4th Cir. 1977), *cert. denied,* 438 U.S. 905 (1978); *Timmons v. Andrews,* 538 F.2d 584 (4th Cir. 1976).

In *Donohoe,* the Fourth Circuit declined an invitation to abstain under either the *Burford*[5] or *Pullman*[6] doctrines. 567 F.2d at 607. In that case, a developer claimed that the county's zoning of its property constituted a taking without just compensation in violation of the fifth and fourteenth amendments to the Constitution. *Id.* at 606. In rejecting the invitation to abstain under the *Pullman* doctrine, the circuit court determined that because no potentially dispositive issue of state law existed, the federal constitutional issue could not be avoided "by a definitive ruling on the state law issue." *Id.* at 607. The circuit court also rejected a *Burford* challenge upon a specific finding that the plaintiff's challenge was to an isolated abuse of power and not a broad attack on an entire statutory scheme. *Id.* at 607 n.12.

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[4] Petitioners refer to three decisions in which the Fourth Circuit abstained from deciding issues which happened to arise in the context of "land use." *Browning Ferris, Inc. v. Baltimore County,* 774 F.2d 77 (4th Cir. 1985); *Caleb Stowe Assocs. Ltd. v. County of Albemarle,* 724 F.2d 1079 (4th Cir. 1984); *Fralin & Waldron, Inc. v. Martinsville,* 493 F.2d 481 (4th Cir. 1974).

[5] *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). In *New Orleans Public Service, Inc. v. Council of New Orleans,* 491 U.S. 350, 361 (1989) (*quoting Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976)), "the principle now commonly referred to as the '*Burford* doctrine' "

(Cont'd)

Similarly, the Fourth Circuit declined to abstain in *Timmons*, a case in which a property owner sued city officials in an effort to enjoin the demolition of her properties. 538 F.2d at 585. Despite the presence of land use issues, the Fourth Circuit reversed a district court decision to abstain. *Id.* The court of appeals noted that there was no action pending in state court and found no unsettled issue of state law, the resolution of which might "dispose of the case without consideration of the federal questions." *Id.* These cases and others must be surveyed in addition to those to which the petitioners have selectively cited. A more complete survey reveals that the Fourth Circuit most certainly has *not* adopted

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(Cont'd)
was noted to require abstention "(1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'excerise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' "

6. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The *Pullman* doctrine requires abstention "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959).

a *per se* rule of abstention in "land use" cases.[7]

The decision in the present case represents no departure by the Fourth Circuit from the case-by-case approach it has taken in analyzing invitations to abstain. *See, e.g., Educational Services, Inc. v. Maryland State Board for Higher Education,* 710 F.2d 170 (4th Cir. 1983). The court of appeals recognized and attached great significance to the distinctive characteristics of this case — especially that the annexation issues presented were not only unique state issues but involved the powers of a specialized state court specifically created to address these issues. (App. 10a). This case is not a generic "land use" case.

II.

THE DECISION IN THIS CASE BY THE FOURTH CIRCUIT COURT OF APPEALS DOES NOT REFLECT A DIVISION AMONG THE CIRCUITS.

The decision of the court of appeals does not, as petitioners insist (pet. 33), give rise to a split among the circuits. That contention suggests both a misreading of the decision in the present case and a misunderstanding of the decisions of the other circuits. The petitioners incorrectly compare this case to those in other circuits dealing solely with the construction of local land use ordinances in states which lack a unified statewide land use scheme. (Pet. 35 n.31). Such a comparison is inapposite. This case is different from those cases, for it involves Virginia's statutory annexation process. Unlike the cases cited by petitioners, this case involves a unified state statutory scheme with specialized courts appointed by the Virginia Supreme Court: courts with the power, indeed the duty, to enforce their own orders; and direct appeals to the Virginia Supreme Court.[8] This case also differs from those cited by the petitioners, in that it involves a unified and complex state statutory scheme and the interpretation and enforcement of state court orders.

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[7] In any event, with the exception of the present case, all of the other decisions pointed to by petitioners or by the respondents were issued prior to this Court's decision in *New Orleans Public Service, Inc.*, 391 U.S. 350. That decision has clarified the standards for reaching a decision to abstain, and to the extent that any earlier circuit court decisions conflict with the direction subsequently given by this Court there appears to be little to be gained by granting this petition.

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[8] The court of appeals included in its decision the following explanation of the Virginia annexation process:

> In Virginia, Annexation Courts are established by statute to determine whether a city or town may annex adjacent land. Va. Code Ann. § 15.1-1035 *et seq.* (1989 Repl. Vol.). The Annexation Court is composed of three judges designated by the Supreme Court of Virginia. Va. Code Ann. § 15.1-1038 (1989 Repl. Vol.). The Annexation Court is to determine the 'necessity for an expediency of annexation' considering the best interests of the city or town and the people in the area to be annexed. Va. Code Ann. § 15.1-1041(b) (Repl. Vol.). If the Annexation Court grants the petition for annexation, the Court 'shall set forth in detail all such terms and conditions upon which the petition is granted.' Va. Code Ann. § 15.1-1041(d).
>
> The Annexation Court 'shall enter an order setting forth what it deemed fair and reasonable terms and conditions, and shall direct the annexation in conformity therewith.' Va. Code Ann. § 15.1-1042 (1989 Repl. Vol.). The Annexation Court remains in existence for 10 years from the effective date of any annexation order entered. Va. Code Ann. § 15.1-1047(a) (1989 Repl. Vol.). The Annexation Court can be reconvened
>
>> . . . at any time during the ten-year period on its own motion, or on motion of the governing body of the county, or of the city or town, or on petition of not less than fifty registered voters or property owners in the area annexed; provided, however, if the area annexed contains less than 100 registered voters or

(Cont'd)

It is misguided to invite comparison between this case and others in which other circuits have been called upon to grant relief from actions taken by local officials pursuant to or in violation of purely local ordinances or statutes. None of the cases cited by petitioners address the propriety of abstention when a federal court is called upon to decide the proper construction of, and ultimately to enforce a state court order. If this case must be pigeonholed as petitioners suggest, perhaps it is more appropriately compared with cases in which litigants have sought to use the federal courts to challenge or bypass state court enforcement of their orders and judgments. Viewed in that context, there is no conflict. The decision fully comports with decisions of other circuits that have recognized the propriety of abstention in order to prevent interference with state court enforcement of its own

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(Cont'd)

> > property owners, then a majority of such registered voters or property owners may petition for the reconvening of the court.
>
> Va. Code Ann. § 15.1-1047(b) (1989 Repl. Vol.). The Annexation Court has the power during the ten-year period to enforce the performance of the terms and conditions under which annexation was granted. Va. Code Ann. § 15.1-1047(c) (1989 Repl. Vol.). Any action by the Annexation Court under § 15.1[-1]047(c) is subject to review by the Supreme Court of Appeals of Virginia. Va. Code Ann. § 15.1-1047(d) (1989 Repl. Vol.). In addition, '[m]andamus and prohibition shall lie from the Supreme Court of Appeals or any circuit court to compel a city or town to carry out the provisions of [the annexation statute] or to forbid any violation of the same.' Va. Code Ann. § 15.1-1048 (1989 Repl. Vol.).

(App. 8a-9a).

orders and judgments. *Schall v. Joyce,* 885 F.2d 101, 116 (3rd Cir. 1989) (abstaining from challenge to methods by which state allows confession judgments to be reopened); *Myers v. Garff,* 876 F.2d 79, 81 (10th Cir. 1989) (abstention warranted to prevent interference with state's method of enforcing custody decrees); *Parker v. Turner,* 626 F.2d 1, 10 (6th Cir. 1980) (abstaining from challenge to state court contempt proceedings). The Fourth Circuit consistently has abstained from resolving challenges to such orders, and this case represents no departure from its own precedent or from the decisional history of other circuits. *See Brandenburg v. Seidel,* 859 F.2d 1179, 1195 (4th Cir. 1988) (abstention appropriate to protect integrity of several orders issued by state receivership court); *Ganey v. Barefoot,* 749 F.2d 1124, 1128 (4th Cir. 1984) (abstention appropriate to prevent second-guessing state courts' management of a custody dispute because the "state courts are fully capable of managing the processing of their case load, and they should be allowed to do it."), *cert. denied,* 472 U.S. 1019 (1985).

Furthermore, even if the action taken by the court of appeals in this case could be generically labeled a "land use" abstention, the petitioners are wrong in their suggestion that it represents a departure from the interpretation of this Court's decisions embraced by other circuits, most notably the First, Third, Eleventh and the District of Columbia Circuits. (Pet. 38). First of all, the decisions relied upon by petitioners include many which likely have no continuing validity in light of this Court's subsquent decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). There, this Court squarely held that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[9]

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[9] It also must be noted that by abstaining in this case, the court of appeals (Cont'd)

Id. at 195. Thus, after *Williamson County,* the claims in the "taking" cases cited by the petitioners would have been unripe unless the plaintiffs could demonstrate that they had sought relief for the alleged taking in state courts and that relief had been denied. (Pet. 36-38). *See, e.g., Silverman v. Barry,* 727 F.2d 1121 (D.C. Cir. 1984); *C-Y Development Co. v. City of Redlands,* 703 F.2d 375 (9th Cir. 1983); *Urbanizadora Versalles, Inc. v. Rios,* 701 F.2d 993 (1st Cir. 1983); *Heritage Farms, Inc. v. Solebury Township,* 671 F.2d 743 (3rd Cir. 1982); *Nasser v. City of Homewood,* 671 F.2d 432 (11th Cir. 1982).

Petitioners assert that "[t]here can be no application of a blanket rule of abstention to land use cases," and suggest that a conflict exists because the Fourth Circuit has adopted such a rule while other circuits have rejected it. As is apparent from the previous discussion, the Fourth Circuit has not adopted a blanket rule of abstention in any category of case. The Fourth Circuit has acted in concert with the decisions of this Court, particularly with its direction that "[a]scertainment of whether there exists 'special circumstances,' . . . prerequisite to . . . [abstention] must be made on a case-by-case basis." *Baggett v. Bullitt,* 377 U.S. 360, 375 (1964) (*citing Pullman,* 312 U.S. at 500). The First, Third, and Eleventh Circuits[10] also have been guided by these principles,

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(Cont'd)

stopped short of considering or ruling on the respondents' substantive allegations of error in the district court. One such challenge was to the ripeness of petitioners' due process claims. Even if petitioners were to prevail on the abstention issue raised here, much of the relief provided by the district court would certainly not survive scrutiny by the circuit court on remand under the *Williamson County* ripeness doctrine.

[10] The District of Columbia Circuit has repeatedly noted that it remains an unresolved question as to the extent to which principles of abstention apply to the relationship between the District's two court systems. *District Properties Associates v. District of Columbia,* 743 F.2d 21, 28 n.4 (D.C. Cir. 1984);

(Cont'd)

and in their case-by-case analyses, they have exercised their discretionary power to abstain in what petitioners would characterize as "land use" cases. *Culebras Enterprises Corp. v. Rivera Rios,* 813 F.2d 506, 515 n.8 (1st Cir. 1987) (abstaining upon landowners' claim for damages for period of time their property was allegedly frozen by unconstitutional land use regulation, and expressly distinguishing *Urbanizadora,* 701 F.2d 993); *Chez Sez III Corp. v. Township of Union,* 945 F.2d 628, 633 n.3 (3rd Cir. 1991) (abstaining from challenge to enforcement of ordinances which restricted the operation of adult bookstore, and expressly distinguishing the result in *Heritage Farms,* 671 F.2d 743); *Fields v. Rockdale County, Georgia,* 785 F.2d 1558, 1562 (11th Cir. 1986), *cert. denied,* 479 U.S. 984 (1987) (abstention found to be warranted in this due process challenge to land use ordinance regulating kennels). *Cf. Izzo v. Borough of Rivers Edge,* 843 F.2d 765, 769 (3rd Cir. 1988) (special circumstances inherent in the facts caused the court to decline to abstain despite noting that "land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong"). Indeed, the circuits agree that a case-by-case analysis is critical in deciding whether or not to abstain. In fact, each circuit held up as an example by petitioners, including the Fourth Circuit, has abstained in certain "land use" cases, and declined to abstain in others. No circuit has adopted a *per se* rule of abstention or non-abstention in "land use" cases, which would place the circuits in conflict as the petitioners argue.

(Cont'd)

Silverman, 727 F.2d at 1124 n.4. *See also Pernell v. Southall Realty,* 416 U.S. 363, 368 n.4 (1974) (declining to reach question of the extent to which the abstention doctrine applies to federal courts in the District of Columbia). Each time abstention has been raised, the circuit court has avoided resolving this question by engaging in a case-by-case analysis and determining that abstention would not be appropriate regardless of how it applies in the District of Columbia.

III.

ABSTENTION IN THIS CASE IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT.

This Court has upheld abstention in cases challenging the integrity of state judicial processes. For instance, it was decided in *Juidice v. Vail,* 430 U.S. 327 (1977), that a federal court should have abstained from exercising jurisdiction over various constitutional challenges to a state court's contempt process. This Court explained that "[a] state's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest," *id.* at 335, which should be respected. Similarly, in *Penzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 13-14 (1987), it was held that abstention was appropriate to prevent interference with the process by which "the state compels compliance with the judgments of its courts." *See also Carey v. Sugar,* 425 U.S. 73 (1976) (abstention appropriate, even in the absence of pending case, to avoid second guessing state's debt attachment procedures).

In reaching its decision to abstain, the court of appeals relied upon the decision in *Burford,* 319 U.S. 315. This Court in *Juidice,* did not specifically rely on *Burford,* choosing to focus on the federalism issues underlying related abstention doctrines. The label attached to the abstention doctrine, however, is not dispositive; rather, what is important is avoiding the disruption to the specialized state process for supervising and enforcing the Annexation Court's orders. That result can be reached relying either on the *Burford* line of cases, or on *Juidice.* Indeed, the two doctrines converge in this case — both focus on upholding the integrity of state judicial processes. Thus, in *Penzoil,* this Court counselled that the "various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." 481 U.S. at 11 n.9. *See also New Orleans Public Service, Inc.*, 491 U.S. at 359.

Petitioners also contend that because the court of appeals noted "that there were no certain or complete state remedies," there is no significant issue of state law presented. (Pet. 30). This argument is misguided, especially in a situation such as this, in which litigants choose to pursue a remedy in federal court instead of state court, and through the passage of time render their state remedies uncertain or incomplete. In *Penzoil*, this Court held that although relief was no longer available in the state trial court, Texaco would not be permitted to escape "abstention by failing to assert its state remedies in a timely manner." 481 U.S. at 16 n.16. This Court explained that "when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary." *Id.* at 15. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-609 (1975); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 80 (1975) (abstention required in case where state court action was begun but 'abandoned' in favor of federal court action); *National Capital Naturists v. Board of Supervisors of Accomack County*, 878 F.2d 128, 132 (4th Cir. 1989) (procedural failings in state proceedings should not meet encouragement in the federal system).

In this case, the petitioners possessed the ability to petition the Annexation Courts for the enforcement of their orders any time within ten (10) years after their effective dates. (App. 9a). The McLaughlins never asked the 1976 Annexation Court to enforce its order as it applied to their property. In 1983 the Industrial Park Corporation did ask the 1978 Annexation Court to enforce its order. The 1978 Annexation Court held that the plan presented to it by the Town would place it in compliance with its order, but it expressly granted the Industrial Park Corporation leave to request further enforcement proceedings. (App. 97a). The court of appeals noted that neither petitioner took any further steps seeking to have the Annexation Court enforce its orders. (App. 9a-10a). The court of appeals further noted that the petitioners also may have had another available route — seeking writs of mandamus or prohibition "to compel a city or town to carry out the provisions of [the annexation statute] or to forbid any violation of the same — and neither took advantage of it." (App. 9a) (*citing* Va. Code § 15.1-1048).

. This case is not the vehicle the Court needs to investigate and resolve any confusion that may exist in the application of the various abstention doctrines to "land use" cases. Because this is a case in which a federal court has been asked to interpret and enforce a state court order, the relationship to "land use" is merely coincidental. To clarify the standards for abstention in "land use" cases will not resolve any questions raised in this case. By the same token, the unique nature and posture of this case makes it unlikely that its resolution will provide substantial guidance to the extent that any confusion does exist in the application of the abstention doctrine to "land use" cases.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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